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1323

United States 1323

Circuit Court of Appeals

For the Ninth Circuit. |

L. E. DOAN,

Appellant,

vs.

B. T. DYER,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FILED

SEP 12 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. E. DOAN,

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vs.

B. T. DYER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

C. W. DURBROW, Esq., 65 Market St., and JOHN BREUNER, Jr., Esq., Hobart Bldg., San Francisco, Calif.,

Attorneys for Appellant.

W. H. METSON Esq., and R. G. HUDSON, Esq., Balboa Bldg., San Francisco, Calif.,

Attorneys for Appellee.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. —

Dept. —

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Amended Complaint.

Comes now the plaintiff and by leave of the Court first had and obtained, makes and files this his amended complaint in the above-entitled case and for cause of action alleges as follows:

I.

That plaintiff is and at all of the times herein mentioned has been a resident of the State of California.

II.

That defendant is and at all of the times herein mentioned has been a resident of the State of California.

III.

That heretofore and on or about the —— day of August, 1918, at and in the said State of California, plaintiff and defendant associated themselves together and entered into and formed a copartnership for the general purpose of carrying on business together in operating oil bearing lands and interests [1*] therein and in mineral oils in the United States, and in particular in the States of Texas, Oklahoma and Louisiana.

IV.

That the more specific purposes of and for which said copartnership was formed as aforesaid were to acquire oil bearing lands, leases on oil bearing lands, of dealing generally in and buying and selling oil-bearing lands, and of acquiring interests in corporations dealing or to deal in the same, and interests in the assets of such corporations, either as copartners or by the formation of corporations to be controlled by plaintiff and defendant, or in which plaintiff and defendant, or either of them might or should become interested.

V.

That said agreement of partnership was wholly an oral one and its terms are and were not reduced to writing.

*Page-number appearing at foot of page of original certified Transcript of Record.

VI.

That plaintiff and defendant thereupon entered upon such copartnership business and ever since have continued to transact and carry on the same except in the respects as to which said defendant has repudiated the same as hereinafter specified.

VII.

That under and by virtue of said copartnership agreement it was agreed and stipulated by and between said plaintiff and said defendant that they and each of them should and would [2] give their attendance and devote their entire time and attention to the business thereof and to the furtherance and advancement of the partnership business and affairs to their mutual benefit and advantage. That said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business and purposes and that they should divide the profits, if any, thereof between them, share and share alike.

VIII.

That it was further understood and agreed as one of the terms of said agreement of copartnership that said copartnership should continue and be in full force and effect until dissolved by the mutual consent of said plaintiff and said defendant.

IX.

That it was further understood and agreed as one of the terms of said agreement of copartnership that each of the parties thereto would and should

at all times during the continuation thereof, keep full, just and true accounts and records of accounts, wherein each of said copartners would account for all moneys and properties of whatsoever kind by them or either of them received, acquired, paid out, transferred or disbursed as well as all profits and losses made or sustained by reason or on account of the said business and all other matters and things whatsoever to the said copartnership and management thereof in any wise belonging.

X.

That as the result of the conduct and maintenance of [3] said copartnership and its business, said plaintiff and said defendant have, as such copartners acquired and disposed of certain oil-bearing lands and leases on oil-bearing lands, actual or potential and now own certain valuable lands and leasehold interests and interests in corporations and in the assets thereof of the approximate value of \$250,000.00.

XI.

That pursuant to the conduct of the said copartnership business each of the parties thereto, to wit, said plaintiff and said defendant, have from time to time paid each to the other certain moneys and delivered and transferred certain properties or rights therein and certain interests in corporations and in or in the assets thereof.

XII.

That said copartnership has never been dissolved and that the same is now in full force and effect.

XIII.

That plaintiff has at all times fully complied with all of the terms and conditions thereof.

XIV.

That since the commencement of said copartnership the defendant has wrongfully and in violation of his trust, and against the will and without the assent of this plaintiff, detained and applied certain of the moneys and properties of their said copartnership business to his, defendant's use, greatly exceeding the proportion thereof to which he was and is [4] entitled, and by reason thereof has become indebted to said copartnership, and has thereby impeded and injured the business thereof and the rights and interests of this plaintiff therein, and defendant has devoted his time and attention to his personal business and affairs to the detriment of said copartnership business.

XV.

That plaintiff is unable to state the value of properties and moneys so converted by defendant to his, defendant's own use, but plaintiff is informed and believes, and upon such information and belief avers the fact to be that the value of same amounts to many thousands of dollars.

And in this behalf plaintiff avers that among the properties and assets of said copartnership so converted by the defendant to his, defendant's own use, is a certain interest in the capital stock of a certain corporation caused to be formed by the defendant, and known as the Doan Oil Co., Inc., and which said

corporation was formed by said defendant acting for said copartnership, to take over and to acquire and it did take over and acquire for the benefit of said corporation, certain interests in oil lands at or near Shreveport, Louisiana, and other places, and in which said corporation the plaintiff is entitled to a one-sixth interest of the capital stock thereof.

XVI.

That plaintiff has requested the defendant to pay and deliver, assign and transfer to said copartnership, the moneys, properties and interests as received by him said defendant, as aforesaid, and to which said copartnership is entitled, [5] or to account to said copartnership therefor, but that the said defendant has heretofore failed, neglected and refused and still does fail, neglect and refuse to pay and deliver, assign and transfer the moneys, properties and interests as received by him, said defendant, as aforesaid, and to which the said copartnership is entitled and to so account, and has threatened to and does continue to receive and retain and withhold moneys, properties and interests which in equity and good conscience he should transfer, assign, pay over and deliver to said copartnership and this plaintiff.

WHEREFORE, the plaintiff prays the judgment of this Court as follows:

1. That the said copartnership may be dissolved, and an accounting taken of all the dealings and transactions thereof and of its properties.
2. That defendant be required to account for all copartnership dealings and transactions and all in-

terests and properties by him received, moneys paid out by defendant and belonging to said copartnership.

3. That the property of said copartnership be sold and its debts paid, and the surplus, if any, divided between the plaintiff and defendant as their respective interests may appear.

4. For such other and further relief as may be just, together with the costs of this suit.

W. H. METSON,

R. G. HUDSON,

Attys. for Pltff. [6]

State of California,

City and County of San Francisco,—ss.

B. T. Dyer, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief and as to those matters he believes the same to be true.

B. T. DYER.

Subscribed and sworn to before me, this 2d day of Dec., A. D. 1920.

[Seal]

ELLA J. McALEER,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 8, 1920. Walter B. Mal-
ing, Clerk. [7]

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division.

No. 543—EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Answer.

COMES NOW the defendant above-named and answering plaintiff's complaint on file herein denies that defendant is a resident of the State of California and in this connection alleges that defendant was at the time of the commencement of this suit and ever since has been and still is a citizen and resident of the State of Louisiana, and a nonresident of the State of California; denies that heretofore and on or about the —— day of August, 1918, or at any other time or at all in the State of California or in any other place, plaintiff and defendant entered into or formed a copartnership for the general purpose of operating oil-bearing lands or interests therein and in mineral oils in the United States or in particular in the States of California, Texas, Oklahoma and Louisiana, or for any other general or particular purpose or for any other purpose whatsoever; and denies that plaintiff and defendant entered into or formed a copartnership at any time or at any place and for any purpose whatsoever.

Denies that the more specific purposes of and for which said alleged copartnership was formed, as alleged in plaintiff's complaint, were to acquire oil-bearing lands, leases on oil-bearing [8] lands, of dealing generally in and buying and selling oil-bearing lands, and of acquiring interests in corporations dealing or to deal in the same, and interests in the assets of such corporations either as copartners or by the formation of corporations to be controlled by plaintiff and defendant, or in which plaintiff and defendant or either of them might or should become interested; and in this connection defendant denies that any copartnership was formed for any purpose whatsoever; denies that said alleged agreement of partnership was wholly or in part an oral one or that its terms were not reduced to writing and in this connection alleges that no agreement of partnership, either oral or in writing was entered into by plaintiff and defendant; denies that plaintiff and defendant thereupon or at any time or at all entered upon such or any copartnership business and denies that plaintiff and defendant ever since or for any time or at all have continued to transact and carry on the same in any manner whatsoever; denies that under and by virtue of said copartnership agreement or under and by virtue of any other agreement it was agreed or stipulated by and between said plaintiff and said defendant that they and each of them should or would give their attendance and devote their entire time and attention to the business thereof and to the furtherance and advancement of the partner-

ship business and affairs to their mutual benefit and advantage; and denies that it was agreed or stipulated that said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business and purposes and that they should divide the profits, if any, thereof, between them, share and share alike, and bear the losses, if any, between them, share and share alike. In this connection defendant alleges that defendant did not at any time enter into any agreement with plaintiff whereby it was agreed that they should give their attendance [9] or devote any time or attention to any partnership business or that plaintiff and defendant should furnish to any copartnership any sums of money whatsoever.

Denies that it was further understood and agreed as one of the terms of said alleged agreement of copartnership that said alleged copartnership should continue to be in full force and effect until dissolved by the mutual consent of the said plaintiff and the said defendant and in this connection alleges that no agreement of copartnership or copartnership existed at any time between plaintiff and defendant; denies that it was further understood and agreed as one of the terms of said alleged agreement of copartnership or at all that each of the parties thereto would or should at all times during the continuation thereof or at any time or at all keep full, just and true accounts and records of accounts, or any accounts whatsoever, wherein

each of said copartners would account for all moneys and properties of whatsoever kind by them or either of them received, acquired, paid out, transferred or disbursed as well as all profits and losses made or sustained by reason or on account of the said alleged business and all other matters and things whatsoever to the said copartnership and management thereof in anywise belonging, or wherein each of said copartners would account for any moneys or properties whatsoever or in any other thing; and in this connection defendant alleges that at no time did he agree with plaintiff to keep any accounts whatsoever.

Denies that as a result of the conduct of maintenance of said alleged copartnership or its business said plaintiff and said defendant have as such copartners acquired or disposed of certain or any oil-bearing lands or leases on oil-bearing lands, actual or potential, and further denies that plaintiff and defendant as copartners now own certain or any lands or leasehold interests or interests in corporations or in the assets thereof; denies that [10] pursuant to the conduct of the said alleged copartnership business each of the parties thereto, to wit, said plaintiff and said defendant, have from time to time or at any time paid each to the other certain or any sums or delivered or transferred certain or any properties or rights therein or certain or any interests in corporations or in the assets thereof.

Denies that said alleged copartnership is or was at any time in full force and effect and in this con-

nection alleges that no copartnership ever existed between plaintiff and defendant; denies that plaintiff has at all times or at any time or at all fully or otherwise complied with all or any of the terms or conditions of said alleged copartnership; denies that since the commencement of said alleged copartnership or at any time or at all the defendant has wrongfully or unlawfully or in violation of his trust or any trust or in violation of any other thing applied certain or any of the properties of said alleged copartnership business to his, defendant's use in any amount whatsoever or at all; further denies that by reason thereof or by any other thing defendant has become indebted to said alleged copartnership or to any other copartnership or person or to plaintiff as a member thereof or at all and further denies that defendant thereby or in any other manner has impeded or injured the business thereof or any other business or thing or any right or interest of the plaintiff therein or in any other thing, and further denies that defendant has devoted his time and attention or done any other thing to the detriment of said alleged copartnership business; denies that defendant applied to his own use in the manner alleged in paragraph fourteen (14) of said complaint a certain or any interest in the capital stock of Doan Oil Co., Inc., or any other property whatsoever; further denies that plaintiff is entitled to a one-sixth ($1/6$) interest or any other interest in said Doan Oil Co., Inc., a corporation, or otherwise, [11] or at all.

Denies that defendant continues to or at any time received or retained or withheld properties or interests which in equity and good conscience defendant should pay over and deliver to said alleged copartnership or to plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by his said complaint and that defendant have judgment for his costs of suit together with such other and further relief as the Court may deem proper.

C. W. DURBROW,
JOHN BREUNER, Jr.,
Attorneys and Solicitors for Defendant. [12]

State of California,
City and County of San Francisco,—ss.

C. W. Durbrow, being first duly sworn, deposes and says: That he and John Breuner, Jr., are the attorneys for the defendant above named; that the defendant is absent from the City and County of San Francisco where affiant and John Breuner, Jr., have their offices and for that reason makes this verification on defendant's behalf; that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

C. W. DURBROW.

Subscribed and sworn to before me this 22d day of June, 1920.

[Seal]

FRANK J. HARVEY,
Notary Public, in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within answer is hereby
admitted this 22d day of June, 1920.

W. H. METSON,
Attorney for Plaintiff.

[Endorsed]: Filed June 22, 1920. Walter B.
Maling, Clerk. [13]

In the District Court of the United States for the
Northern District of California, Southern
Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Memorandum.

W. H. METSON, Attorney for Plaintiff.

C. W. DURBROW and JOHN BRUNER, Attor-
neys for Defendant.

RUDKIN, District Judge.—This is a suit to dis-
solve a partnership and wind up its affairs. The
question involved is largely one of fact. The de-
fendant earnestly insists that the testimony on the
part of the plaintiff is not sufficient to establish

the partnership relation, and that for that reason alone the bill should be dismissed.

It would serve no useful purpose to attempt a review of the voluminous testimony, direct and circumstantial, tending to show the exact relationship subsisting between these parties. But taking into consideration the circumstances attending their advent into the oilfields of Texas, Oklahoma and Louisiana, their conduct and course of business while there, their correspondence, the admissions made by the defendant from time to time, both oral and written, and all the surrounding circumstances, I have little hesitation in finding that their venture was a joint one at least, and I am inclined to the opinion that it constituted [14] a partnership as defined by the Civil Code of California. Whether the relation was the one or the other is perhaps not very material, as substantially the same rights duties and obligations appertain to both.

The contention on the part of the defendant that the plaintiff was only an employee and that in any event Louisiana was not included in their field of operation is not sustained by the proof. Letters written by the defendant before leaving California disclose the opposite. The contention that the parties had a final and definite understanding in the early part of June, 1919, whereby the plaintiff was in effect excluded from Louisiana, or that his interest in Louisiana property was contingent upon his doing certain things in Texas, is hardly consistent with the subsequent conduct of the parties and is not established.

It is to be regretted that intelligent men will permit important business relations to rest in parole when the death of either will seal the lips of both, and when experience has so often demonstrated that prosperity offers temptations that speculators cannot always resist. The plaintiff has established his case by ample and sufficient testimony, and the usual decree will be entered winding up the affairs of the concern and appointing a Special Master to take an accounting. It is hoped that the parties will be able to agree upon the Special Master.

Let a decree be entered accordingly.

NOTE: For the benefit of counsel in preparing the decree, I might add that the relationship between the parties was dissolved in March, 1920, and the accounting should not extend beyond the date of dissolution.

[Endorsed]: Filed Jany. 4, 1921. Walter B. Maling, Clerk. [15]

In the District Court of the United States, in and
for the Northern District of California, Southern
Division.

No. 543—EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

(Interlocutory Decree.)

This cause came on to be heard on the 2d day

of December, 1920, upon the amended complaint and bill of plaintiff herein, and upon the answer of defendant to the original complaint standing, also, as the answer to said amended complaint and bill, and it appearing that the original complaint herein was filed in the Superior Court of the State of California in and for the City and County of San Francisco and that said cause was thereafter transferred in to this court upon the motion and application of the defendant herein, and testimony and proofs having been given, had and taken herein, and it now appearing to the Court that plaintiff is and at all of the times herein mentioned was a citizen of the State of California, that defendant was prior to the commencement of this suit and at all times since has been and is now a citizen and resident of the State of Louisiana, and it further appearing to the Court that in the latter part of August, 1918, in the State of California, plaintiff and defendant orally associated themselves together and entered into and formed a copartnership for the general purpose of carrying on business together in operating oil-bearing lands and interests therein, and in mineral oils in the United States, and under which they were to acquire oil-bearing land and leases [16] on oil-bearing lands and to deal generally in buying and selling oil-bearing lands and acquiring interests in corporations dealing in or to deal in the same, and interests in the assets of the said corporations either as copartners or by the formation of corporations to be controlled by plaintiff and de-

fendants, or in which plaintiff or defendant, or either of them might or should become interested, and it appearing to the Court that plaintiff and defendant thereupon and thereafter entered upon such copartnership business and did, until on or about the 22d day of March, 1920, continue to transact and carry on said business, and it further appearing to the Court that said plaintiff and defendant agree to and did give their attention to and did devote time and attention to the business of said copartnership, and that each did from time to time furnish and supply moneys for the purpose of promoting and carrying on the business of said copartnership, and it appearing further that the said plaintiff and defendant were to divide the profits of said business between said plaintiff and defendant equally, and it appearing to the Court that on or about the 22d day of March, 1920, the said defendant did repudiate said partnership, but that prior to said date the said plaintiff and defendant did acquire certain lands and oil leases upon oil lands in the State of Texas and in the State of Oklahoma, and in the State of Louisiana, and shares of stock in certain corporations, to wit, in the Doan Oil Company and the Martin-Considine Syndicate,

NOW, THEREFORE, this Court doth declare that the partnership in the amended complaint and Bill mentioned is dissolved as and from the 22d day of March, 1920, and doth order and decree the same accordingly.

The Court doth further declare that the said

properties [17] and interests in lands, leases and stocks above mentioned, are in equity assets of the said partnership and the Court doth now order that this proceeding be referred to H. M. Wright, Esq., as a Special Master to take and make the following account and inquiry—that is to say—

1. An account of the partnership dealings between the said plaintiff and defendant since the — day of August, 1918, and including an account of dealings with partnership assets and the acquisition thereof, and the disposition thereof, and the advances made by each, and the receipts obtained by each, and the property obtained by each since that time down to March 22d, 1920, and from March 22d, 1920, all of the avails and profits received of property on hand on said March 22d, 1920, or since received from the sale, trading in or other disposition thereof.

2. An inquiry of what the partnership assets, property and effects now consist and in what manner and upon what terms and conditions the same may be sold most beneficially to all parties interested therein, and it is ordered that said partnership estate and property and effects be divided or sold, with the approbation of the Court, in such manner and upon such terms and conditions as shall appear to be most beneficial to the parties interested therein.

IT IS ORDERED, ADJUDGED AND DECREED that either party may apply at the foot of this decree for further relief not inconsistent

with that previously awarded, upon notice in writing addressed to the solicitor who has appeared for the opposite party.

Dated, January 14, 1921.

FRANK H. RUDKIN.

[Endorsed]: Filed and entered January 18, 1921.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [18]

In the Southern Division of the United States
District Court in and for the Northern Dis-
trict of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Special Master's Report on Accounting.

The interlocutory decree ordering an accounting is dated January 14, 1921, and was filed and entered with the Clerk on January 18, 1921. On February 1, 1921, on motion of counsel for plaintiff, defendant was directed to serve upon counsel for plaintiff and file with the Special Master, a verified statement in writing of matters set forth in the decree. Later during the proceedings, the plaintiff was likewise required to file a written statement of his account with the partnership. In due course, defendant filed his statement of

account and later an amended account and plaintiff likewise filed an account. All of said documents and orders are herewith separately returned.

On March 15, 1921, I was attended by W. H. Metson, Esq., and Roy Hudson, Esq., attorneys for plaintiff, and C. W. Durbrow, Esq., and John Breuner, Jr., Esq., attorneys for the defendant and a hearing was had on that date, and on March 21st, March 23d, April 1st, April 4th and April 7th, 1921, when the case was submitted on briefs thereafter to be filed. The proceedings were taken [19] stenographically by Charles R. Gagan and Edward W. Lehner, official reporters of the Court and the transcript thereof is herewith separately returned. The following exhibits were also received in evidence: Plaintiff's Exhibit "Maguire Statement No. 1," Plaintiff's Exhibits No. 1, 2, 3, 4, and 5. Thereafter briefs were filed by the parties, by the plaintiff on April 12, 1921; by the defendant on April 26, 1921, and by the Plaintiff in reply on May 3, 1921. All said exhibits and briefs are herewith returned. It was stipulated that the evidence taken on the hearing before the Court, together with the exhibits should be part of the evidence upon the accounting and I have examined that evidence. On June 20, 1921, the Master addressed the respective counsel by letter, requesting additional explanation of certain matters regarding the accounting for the disbursement of moneys by Defendant and the respective counsel replied, presenting in written form explanations or arguments by their consulting ac-

countants, copies thereof being also furnished opposing counsel. This correspondence I have bound together in one document and separately returned as matter in the nature of additional argument.

So far as the defendant's accountant, Maguire, has presented certain matters with attached affidavits, which may be deemed new evidence, although no objection for irregularity has been offered, I will say that I have not regarded such new matter, but have only regarded the accounting explanation of matter already in evidence.

The above statements, transcripts and exhibits, together with the evidence and exhibits in the main case constitute all the evidence upon which this report is based.

THE TERMS OF THE INTERLOCUTORY DECREE AND THE NATURE [20] OF THE PARTNERSHIP DISCUSSED.

As frequently happens in references before a Master, counsel have yielded somewhat in their briefs, to a reargument of matters already settled by the interlocutory decree. This, of course, is of no avail since the decree is the chart of the Master's authority and sets the limit of his powers. The evidence in the main case has, however, been properly referred to by counsel and examined by the Master to determine matters of a subsidiary character upon which the decree is silent, such as salaries, interest on capital advanced, and the like.

The decree discloses that the partnership between plaintiff and defendant was formed under

oral terms of association in the State of California. Its limits in time are set as the latter part of August, 1918, for the beginning, and the 22d day of March, 1920, as the termination of the partnership. Its general purpose is defined as "carrying on business together in operating oil-bearing lands and interests therein and in mineral oils in the United States and under which they were to acquire oil-bearing lands and leases on oil-bearing lands and to deal generally in buying and selling oil-bearing lands and acquiring interests in corporations dealing in or to deal in the same, and interests in the assets of said corporations either as copartners or by the formation of corporations to be controlled by plaintiff and defendant, or in which plaintiff or defendant or either of them might or should become interested." Paraphrasing this more briefly, the scope of operation, in territory, was coincident with the United States. The subject matter was mineral oil, oil-bearing lands and interests in the same or the securities of corporations dealing in such properties. It is also recited that the plaintiff and defendant agreed to and did give their attention to the business of [21] the copartnership and that each did from time to time furnish and supply moneys for the purposes of the partnership. The Court finds as to their respective interests that the parties were to divide the profits equally. As matters of accomplishment, the Court finds that during the term of the partnership, the plaintiff and defendant acquired lands and leases upon oil lands in the

states of Texas, Oklahoma and Louisiana and shares of stock in certain corporations, namely, the Doan Oil Company and the Martin-Considine Syndicate.

The evidence shows further something of the manner of operation of the partnership. Both Dyer and Doan were what are ordinarily called "promoters," using that word in its legitimate sense. Each had some capital and credit and in addition, each represented or had promises from groups of capitalists desirous of investing money in the oil business. Apparently they sometimes worked together on a particular piece of land but more often operated independently, but in consultation. From time to time lands would be sold and the profits or losses divided. In 1919 Doan entered upon the Louisiana field, operating in part with his own capital and in part with capital furnished by Messrs. Titus and Lucey as the largest contributors. This enterprise, subsequently organized as the Doan Oil Company, was extremely successful. During the latter part of 1919 and the early part of 1920, the greater part of Dyer's time was apparently given to the management of the North Texas Supply Company, an enterprise at Wichita Falls, Texas, a business dealing in oil well machinery and supplies. This enterprise was outside the scope of the partnership, but was undertaken by Dyer at Doan's request, in part because it promised well and in part because it was desired by Capt. Lucey, a large investor in the Doan enterprise in Louisiana. [22]

Returning to the terms of the interlocutory decree, I am specifically directed to take the following account:

“1. An account of the partnership dealings between the said plaintiff and defendant since the — day of August, 1918 and including an account of dealings in partnership assets and the acquisition thereof and the disposition thereof, and the advances made by each, and the receipts obtained by each, and the property obtained by each since that time down to March 22, 1920, and from March 22, 1920, all of the avails and profits received of property on hand on March 22, 1920, or since received from the sale, trading in or other disposition thereof.”

It will be observed that a distinction is made between the property or its proceeds and the cost thereof during the partnership until March 22d and after the date of termination of the partnership, the profits or proceeds from the property on hand on that date or since received from sale, trading in or other disposition thereof. I point out that the last words quoted recognize a continuing power, though not necessarily a right, in either partner in whom property of the firm might rest to sell or otherwise dispose of it after March 22, 1920. Dividends received since that date would, of course, be included under the designation of profits.

I am also directed by the decree to make the following inquiry, namely:

“2. An inquiry of what the partnership assets, property and effects now consist and in what manner and upon what terms and conditions the same may be sold most beneficially to all parties interested therein, and it is ordered that said partnership estate and property and effects be divided or sold with the approbation of the Court of the Court in such manner and upon such terms as shall appear to be most beneficial to the parties interested therein.” [23]

Plainly this requires me to find what the existing partnership assets are and to recommend how they be divided or be sold.

It will be noticed that nothing appears in the decree nor in the proceedings as entered in the Clerk's register to show that there were any debts of the partnership and no provision has been made for giving notice to creditors or for proof or payment of debts. I assume, therefore, and the briefs bear out that assumption, that no debts of the partnership exist.

93,000 SHARES OF DOAN OIL COMPANY.

There were issued to L. E. Doan, in compliance with a prior subscription by him for that amount, a total of 100,000 shares of the Doan Oil Company out of an original total issue of 300,000 shares. Defendant claims that of this amount only 93,000 shares can be considered assets of the partnership.

There is no very serious, or at least very effective opposition by plaintiff to defendant's proof that he paid of his own moneys to the Doan Oil Com-

pany or for its benefit, either before or after its organization, the sum of \$93,000.00 for 93,000 shares of stock; the greater part of plaintiff's objection is to the manner of calculating interest, which will be hereafter referred to under a separate heading. The Doan Oil Company was formed on June 27, 1919. Both before that time and thereafter until the company's books were finally opened, that is, from about April, 1919, until September 2, 1919, Doan carried on the business in his own name and with his own bank account. Messrs. Titus and Lucey paid their subscriptions from time to time to Doan, who deposited the money in his own account. From this account consisting of his own and his associates' money, he paid moneys for account of the company. On September 2, 1919, a transfer was made [24] by Doan to the company of all property acquired and a check for the balance paid to the company, after an accountant's settlement and writing up of the books of the Doan Oil Company. This final check is stated in the account and in the briefs and testimony throughout the proceedings as amounting to \$48,738.53. From the letter of Messrs. Durbrow and Maguire written me in July, 1921, after the submission, it appears that the amount stated was a typographical error and that the true amount was \$48,378.53. All doubts which may have arisen from the record as to the proper account of the amount which Doan invested in this stock seems to me conclusively settled from the two letters of Mr. Maguire dated July 1, 1921, in which a recon-

ciliation is set forth. It is entirely clear to me that the amount of his own money invested by Doan in this 93,000 shares was exactly \$93,000.00. Under the decree Dyer is, of course, entitled to one-half of these shares on making payment to Doan of one-half their costs, or \$46,500.00 with interest as hereinafter set forth.

7000 SHARES.

A fuller statement of the facts in evidence is necessary to comprehend the issue arising as regards this 7000 shares of the Doan Oil Company.

Doan began his operations in the way of assembling property and disbursing money under leases as early as April, 1919. On June 27, 1919, the Doan Oil Company was formed. By the original subscription agreement dated June 27, 1919 Louis Titus subscribed for 150,000 shares, J. F. Lucey for 50,000 shares, L. E. Doan for 98,000 shares, S. S. Raymond for 1000 shares, and J. A. Thigpen for 1000 shares, a total of 300,000 shares. (Transcript 227-228.) It is agreed that Raymond and Thigpen were dummy directors and that their shares were the property of Doan. Raymond subsequently resigned and his stock was transferred to J. B. Stephens, who filled [25] his place as a director and secretary of the Company and it is agreed that Stephens was and is a dummy of Doan, who owned the 2000 shares in question. When the books of the Company were opened and Doan transferred to the Doan Oil Company the money in his hands amounting to \$48,378.53 theretofore contributed by Titus, Lucey and himself, his sub-

scription was not complete by \$7000.00. On November 10, 1919 the Board of Directors of the Doan Oil Company passed a resolution "That the salary of L. E. Doan be fixed at \$1000.00 per month." (Transcript 230.) It is obvious that this resolution does not in terms warrant the credit to Doan of back salary, but this was done and the correctness of so doing is not here an issue. The books show that on November 14, 1919 two entries were made to the credit of Doan, one for \$7000.00 and one for \$1000.00. The first is explained as back salary for the seven months from April to October, 1919 inclusive; the second as salary for the current month of November. It may be assumed, though it is not in evidence, that Doan continued in receipt of this salary. By this credit of \$7000.00 Doan's original subscription to 100,000 shares was completed.

Meanwhile, during the period of April to November, Dyer had been engaged in various oil enterprises in Texas and Oklahoma, but had given his time from May chiefly to the North Texas Supply Company. As president of this company he received a salary of \$500.00 a month. He does not include it in his statement of the partnership account. As stated before, Dyer had entered on this supply business reluctantly and had subscribed to 10,000 shares of its stock. His reluctance was due to the fact that he was not skilled in this business and could command no capital for investment except in oil enterprises. He was persuaded by Doan and Lucey to undertake it. Doan desired

to oblige Lucey on account of his help [26] in investing in the Doan Oil Company. Lucey was an extensive dealer in oil well supplies, who desired to enter the North Texas field under cover of another corporation than his own by reason of certain outstanding engagements with others not to enter that field. Dyer did not pay for or otherwise acquire the 10,000 shares; this will be hereafter referred to. Toward the latter part of 1919 Dyer was offered employment by the American Oil Engineering Company as a local representative to discover and investigate opportunities for investment in oil lands in the Texas field. Apparently in the late fall of 1919, the time not being defined, he spoke to Doan about this employment, asking if it would be all right to take it and keep the salary; that he, Doan, was having his salary from the Doan Oil Company. Doan replied that it was all right and it would bring them in touch with New York capital. (Transcript, main case, page 61.)

From a letter by Dyer to Doan dated Fort Worth, Texas, January 21, 1921, Defendant's Exhibit "C," main case, it appears that on January 20th Dyer and Doan had a meeting at Fort Worth, in which payment by Dyer to Doan of his one-half of the Doan Oil Company investment was discussed. Dyer says, "I am going to hold off the getting of the \$50,000.00 until the last minute after you have had your meeting with Mr. Titus and decide on your policy." He goes on to explain that in raising the money he would have to part with some of his stock and if Titus and Doan de-

cided either to sell off some of their land or shares of stock that would reimburse present holders, he would not care to make that sacrifice. In a letter dated January 23, 1920, Exhibit "D," main case, Doan acknowledges receipt of Dyer's letter of the 21st and states that there is no possibility of a sale of land during the next few months succeeding. He also says: "If you are unable to arrange for your [27] money by the first of February, we will have to change our plans somewhat because I will have to raise some money at that time and I am depending on you. * * * if you have to give up one-fourth to raise your money, I will do it for you on the same basis." Dyer answered on January 26, 1920, saying, "I have your letter of the 23d and as I explained to you when you were here, it was agreed that I could obtain this money by giving the one-fourth interest mentioned. You asked me to write by return mail and stated that you would do this on the same basis. If this is agreeable, I would much prefer to handle the matter together with you on this basis as it would eliminate having any outsiders or any complications. If this is agreeable to you, please drop me a line and I would go no further to obtain this money on the outside. I want this absolutely agreeable to you either way and if you prefer to have me get the money advise me and I will get it at once." Defendant's Exhibit "E," main case. No further letters appear that I am aware of, concerning this matter.

On this state of facts, plaintiff contends that he

is entitled to one-half of the 7000 shares as well as of the 93,000 shares. Doan on the other hand contends that he is only accountable for the 93,000 shares and cites the conversation quoted above with respect to the partners retaining their salaries paid by the Doan Oil Company and the American Oil Engineering Company as evidence of an agreement and a term of the partnership that salaries or property obtained by salaries were not partnership assets. Defendant's counsel also refers to the fact that Dyer has accounted neither for his salary from the North Texas Supply Company nor for his salary from the American Oil Engineering Company.

It must be remembered in the first place that in the absence of agreement to that effect, partners are not entitled to [28] salaries from the firm and in the absence of similar agreement, must give all their time to the firm. From this it would follow that any money or other property acquired by either party while engaged in firm business would be partnership assets. This would include salaries or the proceeds of investment of salaries.

In the second place the subscription by Doan to 100,000 shares of the Doan Oil Company, accepted by the Company, became an asset of the partnership. No part of the stock thus subscribed for could therefore be diverted by Doan to his own behalf without an agreement to that effect, since it would, in effect, be allowing him compensation from the assets for services which the law required him to give without special reward.

I do not think that the conversation between Dyer and Doan above quoted can be considered as having a retroactive effect. It is not shown that Dyer knew that Doan had received a \$7000.00 credit for back salary, which he had applied in satisfaction of his subscription. The conversation, moreover, is readily explicable as applying to salaries thereafter paid. This interpretation is borne out by the actual practice of the parties as disclosed in the accounting on this hearing. If Dyer has not accounted for salaries paid to him Doan has not accounted for any salaries paid him after October, 1919. Dyer's failure to account for salary from the North Texas Supply Company from May to October, 1919 is not inconsistent since he doubtless considered that that business was outside the scope of the partnership, that he had done it as a favor to Doan and that the salary was, therefore, properly his. At any rate, I think this is the correct view to take of the North Texas Supply Company enterprise and if I am wrong, it simply means that Dyer must be charged in the accounting with \$500.00 salary per month for the months stated. [29]

To my mind, however, conclusive corroboration of this view is afforded by the letters exchanged between the parties in January, above quoted, some months succeeding the conversation with respect to salaries. Dyer there mentions \$50,000.00 as his share of the contribution to the subscription to the Doan Oil Company stock and Doan in his answer makes no objection to the amount as stated. If

he then thought that these 7000 shares were not partnership assets, it would have been most natural for him to call Dyer's attention to the mistake.

I conclude, therefore, that these 7000 shares of Doan Oil Company stock as well as the 93,000 previously mentioned are partnership assets and that Dyer is entitled to one-half thereof on accounting to Doan for \$3500.00 with interest as hereinafter stated.

SECOND ISSUE OF 33,333 SHARES DOAN OIL COMPANY.

At a director's meeting of the Doan Oil Company held on November 10, 1919, the corporation offered for sale 100,000 shares of its capital stock at \$1.00 per share, payable one-half on or before December 15, 1919 and one-half on or before January, 1920, and that said stock be offered to the stockholders as follows:

50,000 to Titus,

33,333 shares to Doan, and

16,667 shares to Lucey,

and that if any of such stockholders failed to subscribe and pay for all or any portion of their allowance, the stock should be subjected to such further action as the Board might decide. It may be said now that the terms of payment as prescribed were apparently not strictly enforced. It is claimed by plaintiff that the Master should determine the value of the stock of the Doan Oil Company in connection with this second issue and in other connections, but it does not seem to me material. It is sufficient to say that the evidence

[30] shows that the stock was valuable, worth at least the issue price, and in my opinion considerably more. In fact, on March 26, 1920, a dividend of fifty cents per share was declared on the entire capital stock including this second issue of 100,000 shares as well as the first issue of 300,000 shares.

This right given to Doan to subscribe to 33,333 shares by this Company was valuable and was a partnership asset. Good faith to his partner required that Doan should exercise it for the partnership benefit if he could and should also disclose the right to subscribe to Dyer. He did neither.

As to his failure to disclose this subscription right to Dyer, it may be said that his action is, of course, peculiar in that during all this time he was writing voluminously to Dyer about his operations and the success of the Doan Oil Company. However, I draw no special inferences of bad faith for the few months succeeding the passage of the resolution or until about March, 1920, when relations between the partners began to be strained. In any event, it is not evident from the evidence that Dyer would or could have subscribed to this extra stock and so he is not proved to have been harmed by Doan's nondisclosure. He apparently had no considerable funds of his own and his credit is limited by the proofs to \$50,000.00. It is therefore not apparent that Dyer could have taken the extra 16,666 shares any easier than Doan could have done so.

As to Doan's failure to exercise his right, Doan has testified that at that time he did not have the

funds and that has not been proved untrue. His statement is corroborated by the fact that he did not himself pay for any of this stock until March 23, 1920. There is, of course, evidence the other way in the above quoted letter of January 23, 1920, where Doan said that he would take [31] over Dyer's obligation to pay \$50,000.00 to the partnership on the terms mentioned by Dyer. This, however, can be readily explained by Doan's expectation that he could get a loan of the necessary amount and keep all or a portion of the 12,500 shares for himself. In any event, it must be remembered that the terms of the partnership implied a discretion in Doan as to how much of his money he should invest. He certainly could not be compelled to borrow nor even to invest funds of his own if he did not deem it wise. Noninvestment, therefore, in the second issue of stock, as a fact *per se*, is no evidence of bad faith to the firm and Dyer cannot complain.

The actual disposition of the shares do not change this conclusion. The right to take up 3,333 shares went to S. S. Raymond, geologist of the Company. Doan explains that Raymond desired 10,000 and it was agreed between Titus, Lucey and himself that they would satisfy Raymond's desire to pro rata contributions from their respective allotments. Five thousand (5000) shares of this issue went to Claude Gatch and one, Morris. Messrs. Gatch and Morris, business men of high standing in Oakland, California, had on April, 1919, at Doan's suggestion, sent him equal parts of \$5000.00 for

investment in oil properties. It was thus money which Doan had in hand since the beginning of his operations in Louisiana, part of the capital with which he operated and was, therefore a debt of the partnership in the same sense as was money supplied by Messrs. Titus and Lucey to Doan. As a matter of fact, it should have been satisfied out of the first issue. Its satisfaction out of the second issue was the fulfillment of a partnership liability and cannot be questioned by Dyer.

Fifteen thousand (15,000) shares went to Doan's relatives, namely, 5,000 to his nephew, R. E. Doan; 2500 shares to his [32] sister, Hattie E. Doan; 2500 shares to his sister, Mary Elizabeth Doan; 4800 shares to his brother, C. E. Doan; and 200 shares to the latter's daughter, Mrs. Elbert C. Parks. The bare fact that this stock went to Doan's relatives raises a presumption of a collusive arrangement for Doan's benefit at Dyer's expense and plaintiff so charges, but the evidence is very plain that each of these persons paid for the stock with his or her own money and that there was and is no agreement for resale to Doan. The money was sent to Doan in the latter part of December, 1919, on his suggestion that the investment was a wise one. If, as he states, and as we must assume, he had no money of his own for further investment it was natural and proper that he should invite those near to him to take over his right to the stock. The fact that these remittances passed through Doan's account and even rested temporarily with him does not change this conclusion.

There remains a balance of 10,000 shares, which the stock book shows was issued on March 22, 1920, to L. E. Doan and reissued April 2, 1920, to L. E. Doan, Jr. Payment was made by defendant Doan's check on March 23, 1920, in the sum of \$14,498.57 and by the application of a credit to Doan on the books of the Company arising from prior transactions, of \$501.43. This \$15,000.00 covered the 10,000 shares in question and the 5000 issued to Gatch and Morris. Of this amount \$10,000.00 was, of course, Doan's own funds. There is considerable testimony aiming to prove that Doan had promised his son an interest in the Doan Oil Company in the summer of 1919, partly out of natural affection and interest and as a reward for meritorious conduct in the National service during the war. This evidence seems to me immaterial. Doan's first duty at this time was to his partner. If Doan had invested this money and caused the issuance of 10,000 shares to his son at the time he [33] promised it to him in the summer of 1919, my conclusion would be that lacking Dyer's consent, such an investment of his money would have been unauthorized and would have to come out of Doan's share of the assets. But it must be remembered that Doan had the right, as Dyer had, to dissolve the partnership at any time. He did so by repudiating it on the morning of March 22, 1920, and his investment the next day was after the termination of the partnership. The point is possibly debatable, but my mature conclusion is that this purchase of shares by Doan was not a

partnership transaction. I conclude that the amount of shares here under discussion, 33,333 shares, did not and do not constitute an asset of the partnership.

SANTA MARIA MATTER.

Doan includes in his statement of account the account of what he calls the Doan Syndicate. This account covers a period beginning November, 1916. The syndicate seems to have consisted of Dyer, Doan, J. F. Lucey, J. F. Carlson, H. Fleishhacker and I. Strassburger. It concerned an oil operation near Santa Maria in California, which apparently was not successful. The proofs satisfactorily show that the balance still due from Dyer to Doan on this account amounts and did amount at the termination of the partnership on March 22, 1920, to \$3553.47.

In the statement of account filed by Dyer, plaintiff does not include any reference to the Santa Maria matter for the reason "That this transaction was a California one and not involved in the partnership. Plaintiff, however, concedes that there is due to Doan about \$3000.00."

Under the decree plaintiff's position that this is not a transaction of this partnership is correct, though not for the reason given. The terms of the partnership as stated in the decree seem broad enough to cover the transactions, if any, in California, [34] but it will be noted that the partnership referred to in the decree is stated to have begun in August, 1918, while the partnership, if it was one, concerning the Santa Maria property

was evidently another and earlier partnership since it began in 1916.

It seems fairly well settled, however, by authority and is certainly in consonance with the procedure of courts of equity that if in this accounting Doan is found to owe any money to Dyer, he may set off an existing debt of Dyer to himself. *Christian & Craft Grocery Co. vs. Hill*, 26 Southern, 149, 152. Since it is conceded that Doan has received such money, for example the dividends on Doan Oil Company stock of April, 1920, the balance stated on the Santa Maria transaction will be allowed him in set off. In other words, it will be charged against Dyer in the amount of \$3553.47 with interest from the termination of the partnership.

CONSIDINE-MARTIN OIL COMPANY.

Plaintiff's contention as regards this matter is that Doan must account for 20,000 shares of the stock of this Company. Defendant's position is that it is not a partnership asset at all, but that in any event, only 15,000 shares should be accounted for. The question as to whether it is a partnership asset is not open to defendant on this accounting, since it is so specifically held in the interlocutory decree.

The facts may be briefly stated. At the time when this Company was being promoted, one Terry, had the opportunity to be one of a syndicate to furnish \$10,000.00 to obtain a lease of certain oil lands in Texas. He did not have the money and obtained from Doan a loan of \$2666.00 under an agreement that he would pay Doan one-half of

any interest he thereafter received. A Company was organized and 30,000 shares were issued to Doan, Terry desiring for reasons of his own that his interest should not appear in his name. [35] Dyer testifies that Doan at one time told him that his share of this was 20,000 shares or two-thirds and Doan denies the conversation. The \$2666.00 was subsequently returned to Doan by the Company so that the shares cost him nothing. The evidence on this subject is not as clear as it might be, but yet is sufficient to show to my satisfaction that the amount to be taken as partnership assets was 15,000 shares. Plaintiff is therefore entitled to one-half of 15,000 of the Considine-Martin Oil Company shares of stock, together with one-half of a dividend of \$150.00 received by Doan, or \$75.00. There must be a supplemental accounting to determine whether further dividends have been received.

OPTION TO GENERAL PETROLEUM CORPORATION.

Under the date of April 16, 1920, an option agreement was signed by the Doan Oil Company as first party, L. E. Doan and Louis Titus as second parties, and the General Petroleum Corporation as third party, whereby, (1) the Doan Oil Company gave the General Petroleum Corporation an option for eight months to purchase its so-called Pine Island property for \$2,000,000.00, payable \$50,000.00 in cash and \$1,950,000.00 in shares of the capital stock of the General Petroleum Corporation taken at \$200.00 per share; or (2)

in the alternative, the General Petroleum Corporation was given the option by Doan and Titus to purchase 50% of the capital stock of the Doan Oil Company at the same price above mentioned for the Pine Island lease. The General Petroleum Corporation agreed to pay to Doan and Titus \$50,000.00 on the execution of the agreement and \$200,000 in their stock at the rate of \$200.00 per share as soon as permission to issue the stock was granted by the State Corporation Commissioner of the State of California. "This payment to apply on the purchase price in the event of the exercise of their option." The third party was obligated to drill three wells [36] on the Pine Island land at their expense. The Doan Oil Company was given the right to declare dividends on its capital stock pending the option, but if the third party exercised its option to purchase 50% of the stock, the amount of dividends declared were deductible from the balance due. All machinery, equipment or structures used in the operation of wells drilled were to become the property of the Doan Oil Company unless the wells were dry holes, in which event it could remove its property unless the removal of casing would endanger the oil sands; the Doan Oil Company to have the right to purchase said casing at one-half the cost in any event. If the wells proved productive and the option took the form of a purchase of 50% of the stock, the Doan Oil Company would pay the General Petroleum Company the cost of drillings and equippings the wells. In October, 1920, the option was ex-

tended until two wells therein referred to were completed in the exercise of reasonable diligence, together with other modifications not material here to be stated. At the time of the hearing in March and April, 1921, this option was still in effect.

The \$50,000 cash mentioned in the agreement was paid by the General Petroleum Corporation to Titus and Doan and, it may be assumed, on April 16, 1920, the date of execution of the agreement. The thousand shares also referred to were issued by the General Petroleum Corporation on May 3, 1920. (Transcript 154) and to the persons directed by Messrs. Doan and Titus (Transcript 152). The cash and stock thus received by Doan and Titus was divided by them among all the stockholders in proportion to their holdings of stock of the Doan Oil Company. (Transcript 45 and following: 131, 138, 139, 152, 154-156.) The proportion would be one-eighth of a dollar to each share of a Doan Oil Company held and one share of General Petroleum stock for every 400 shares of Doan [37] Oil Company stock held. The record shows that this was carried out and that Doan received \$12,500.00 cash and 248 shares of stock of the General Petroleum Corporation. He was entitled to 250 shares, but sold two shares to Mr. Titus at the market price in order to round out the latter's holdings. The question is whether this stock and cash is within the accounting with Dyer.

Defendant contends that it is not. This contention was first based on the theory that it was a transaction by Doan after the termination of the

partnership and therefore entirely outside his scope. This position alone is untenable since the dividends on the Doan Oil Company were likewise declared in April, 1920 and are conceded to be within the accounting as the fruits of partnership assets.

In the brief, defendant's counsel seems to suggest a second theory of defense. It is argued that the consideration for the granting of the option to buy the Pine Island property was the promise by the General Petroleum Corporation to develop these properties at their own expense and the consideration for the agreement of Titus and Doan to sell 50% of the stock of the Company was the payment thereon of \$50,000 cash and 1000 shares of stock. It is further argued that by reason of the stock owned and controlled by them, Titus and Doan were in a position to deliver 200,000 shares. This is a fact since Titus through the East Side Investment Company, which he owned, held 172,000 shares of the Doan stock and 3000 shares in his own name, and Doan, of course, held at least half of 100,000 shares, belonging to the partnership. The effort seems to be to put the transaction in the light of a personal obligation assumed by Titus and Doan to deliver a half interest in the stock; one in which the other stockholders and the corporation itself had no interest and it is accordingly deduced that the \$50,000 and 1000 shares received by [38] Titus and Doan constituted their personal funds, given them in consideration of their option for which they were not accountable

either to the corporation or to the other stockholders.

This construction does not square with the agreement or with the course of action of the parties. The option agreement is peculiar in that two options are contained in it and one payment is made upon the purchase price. It will be noted that the purchase price is identical in the two options involved. No provision is made in words for the application of the first payment in the event that the option was exercised to take the Pine Island property. The \$50,000.00 and the 1000 shares were to apply on "the purchase price" without specifying which of the two purchase prices. Obviously, if the land was bought, Messrs. Titus and Doan would have to account to the Doan Oil Company for the money and shares received on the execution of the agreement. Doubtless because they expected in that event to declare out the \$2,000,000.00 received in the form of a dividend, they proceeded at once to distribute the money and stock received to the other stockholders, or at least to give each stockholder the right to option one-half of his stock (see letter to Gatch, transcript 131, 152). If during the life of this option the General Petroleum Corporation should take over the Pine Island Company, Dyer would benefit by his ownership of 50,000 shares of Doan Oil Company stock and would be entitled to his share of the first payment as well as any subsequent payment if distributed. This leads me to the conclusion that the agreement as to the delivery of stock has been

shown by the practical construction thereof of the parties, as an agreement in behalf of all the stockholders and whether or not the General Petroleum Corporation exercises its option to take the stock or even its option to take the land, it seems to me that this transaction [39] is in the nature of an attempted sale of part of the partnership assets and within the terms of the decree.

It accordingly follows that Doan must account to Dyer for one-half of \$12,500.00 with interest thereon at 7% per annum from April 16, 1920; for one-half of the proceeds of sale of two shares to Titus at \$137.00 per share, with interest from May 3, 1916, and for one-half of 248 shares of stock of the General Petroleum Corporation, namely, 124 shares. He must also account for one-half of all dividends received on the above stock. It is suggested by the evidence that dividends have been received, but the amount thereof was not a matter of examination. Plaintiff's brief demands credit to Dyer in the accounting for one-half of the value of the General Petroleum stock on April 16, 1920, the date of the contract. He goes further and in consonance with his theory as to the second issue of the stock, claims an interest in the General Petroleum stock distributed to those shareholders. The latter claim is, of course, disapproved. In the absence of anything in the brief discussing the theory upon which the value of the stock rather than the stock itself is claimed, I will for the present await enlightenment from the objections to the draft report. It should, of course, be

pointed out that the stock was not received until May 3, 1920.

THE CLAIM AGAINST DYER IN THE MATTER OF NORTH TEXAS SUPPLY COMPANY.

Defendant next claims that Dyer should be charged with one-half of the value of 10,000 shares of the North Texas Supply Company and with one-half of his salary received from that Company. At the time he assumed the presidency of this Company at the request of Doan and Lucey, Dyer expressed his inability to command capital for investment in the supply business, although he had financial backing for the oil business, and his consequent reluctance to [40] subscribe for these shares. His objections seem to have been overcome by a promise of Lucey to carry them for him and it was later proposed that he should have them as a bonus if the business of the company reached certain proportions. In the early part of 1920 it seems to have been proposed by those in control of the Company to vote him this bonus stock, but in May, 1920, Mr. Doan wrote a letter to those in charge protesting against the issuance of the stock to Dyer. The stock was never issued.

The claim thus assumes the aspect, not of a claim to a share in partnership assets, but a claim for damage to the partnership in the nature of a wrong. There seem to be several answers. One is that Doan can hardly complain in view of his protest. The second is that in my reading of the decree, I see no scope for a ruling that the supply

business was within the scope of the partnership. Dyer really went into an outside enterprise as a favor to Doan to advance the partnership interests in so far as it assisted Doan in securing Lucey's adherence to the Doan Oil Company enterprise. For the same reason it seems to me that Dyer need not account for the \$500.00 a month salary received.

INTEREST.

The major part of the dispute between counsel disclosed in the briefs concerns the amount and method of computing interest on Doan's advances to the partnership capital by way of investment in the property of the Doan Oil Company. Doan's method disclosed in his statements, charges interest to a date of computation on every payment made to or for the benefit of the Doan Oil Company and credits the firm with interest on all contributions received from Titus, Lucey, Gatch and Morris. Plaintiff objects that this in effect gives Doan the benefit of interest on money supplied him by these outside sources and in the alternative proposes that a proper method would be to determine from day to day [41] during the acquisition of the Doan Oil Company stock, the balance of Doan's own money shown to have been invested therein. He stops his interest calculations with January 1, 1920, the time when Dyer asked for a statement of account and offered to pay any balance due from him.

In my opinion both parties are clearly wrong. It is a general rule of the law of partnership that in the absence of an agreement that interest should be charged on the advances of partners to firm

capital or on balances to a partner's credit, no such interest will be allowed.

Ferrell vs. Jones, 39 Cal. 655;

Adams vs. Lambard, 80 Cal., 438;

Falkner vs. Hendy, 80 Cal., 636, 103 Cal. 26;

Young vs. Canfield, 33 Cal. App. 343;

Carpenter vs. Hathaway, 87 Cal. 434;

30 Cyc. 441-443; 698-699.

Neither the findings in the interlocutory decree nor the evidence taken in this case disclose anything from which an agreement either express or implied to pay interest on advances to the partnership can be found. Indeed, such evidence as there is indicates a contrary understanding. For example, no interest is charged in the statement pertaining to the Santa Maria matter or the Considine-Martin matter. The letters of January 21st and January 23d naming \$50,000.00 as the amount to be paid Doan by Dyer for one-half the stock obviously took no account of any accrued interest. As regards moneys received by Doan after the dissolution, while he was no longer in the partnership he was a trustee of the partnership property in his hands, under the duty of paying to Dyer upon receipt, his share of any profits or proceeds accruing to one-half the partnership property. He will be charged with interest, therefore, on dividends of the Doan Oil Company from April 12, 1920, the date when they were payable, on the cash payment [42] by the General Petroleum Corporation from April 16, 1920, and on other items of cash on hand at the date of dissolution from March 22, 1920. I charge

no interest on the small dividend received from the Considine-Martin Oil Company in this accounting for the reason that the evidence does not disclose the date of its payment.

As regards money due from Dyer to the partnership, it is true, of course, that he offered to make settlement prior to March 22, 1920, but made no tender. There is sufficient evidence to show that he could have paid \$50,000.00 by the help of either Sanderson and Porter or of the Anglo & London, Paris National Bank of San Francisco. It does not seem equitable that Dyer should be relieved of paying interest on moneys in his hands while on the other hand he is receiving the advantage of dividends and interest thereon coming from the partnership property in Doan's hands. It seems just that interest should be charged on moneys due to Doan from the date of dissolution on the theory that matters should then have been settled.

WELLS vs. BABCOCK, 27 N. W. 375.

METHOD OF SETTLEMENT * * * NE-
CESSITY OF SUPPLEMENTAL AC-
COUNT.

Since no receivership was established by the interlocutory decree and no injunction against transfers of property issued, all the stocks declared to be partnership assets have remained in defendant's control. The evidence shows that he still held them at the time of the Master's hearing in March and April, 1921. Before a final decree can be granted, it must be determined whether the 100,000 shares of the Doan Oil Company, the 15,000 shares

of the Considine-Martin Oil Company, and the 248 shares of the General Petroleum Corporation are still available for division. It must also be shown what, if any, dividends have been collected by Doan [43] from the Doan Oil Company other than the dividend declared on March 26, 1920, dividends other than the \$150.00 collected from the Considine-Martin Oil Company, and dividends collected on the 248 shares of General Petroleum Corporation since their receipt by Doan. If the parties desire it, the Master could reopen the present hearing for this purpose, but it is obvious that the orderly way would be to issue an injunction against transfer to preserve the *status quo* until the hearing was had and acted upon by the Court.

As stated before, I am directed to recommend in what manner and upon what terms and conditions the partnership assets should be divided or sold in accordance with the best interests of the parties. Plaintiff asks a receivership and sale of the entire assets. It is usual in partnership settlements for a receiver to be appointed to take over all firm assets, pay partnership debts from cash accruing or sale of assets and then divide the balance in cash or in kind as may seem best to the Court. Here we may infer that there are no partnership debts. The assets if still on hand, as they were at the time of the hearing, can be divided upon Dyer's making payment of the amount found to be due to Doan. It is obviously an unnecessary hardship upon Doan to have to endure a receivership for his share of the partnership assets.

Defendant's counsel suggests that the shares of stock found to be due to Dyer, in order to protect Dyer's rights pending appeal should be placed in a suitable depository to be designated by the Master, with instructions to deliver the stock to defendant in the event of final decision in his favor, or to deliver the stock to Dyer in the event the decision favors him upon his paying to Doan the amount found to be due. It is, of course, obvious that if this [44] stock should be ordered delivered, suitably endorsed by Doan, to a Receiver, a Master or a trust Company, there would be the additional advantage to Dyer that the impounding of the property would make it sure the dividends hereafter accruing to the stock would be also impounded and that there would be a possibility of converting the same into cash pending further proceedings, subject to the approval of the Court. Other than these suggestions in the briefs, there is little in the way of discussion to enlighten my judgment.

It seems to me, however, that the matter last discussed is not one in which the Court has asked or needs the Master's assistance. It really concerns the method in which a supersedeas can be effected in case an appeal should be taken from the decree of this Court. My conclusion is that all that need be recommended by the Master or provided in the decree is that Doan make delivery to Dyer of one-half the shares declared to be partnership assets upon Dyer's paying to him or

depositing in Court for his benefit the amount found to be due.

There follows my computation of the amounts with interest found to be due from Dyer to Doan and from Doan to Dyer and the resulting balance. Interest has been here calculated to the date of computation, to wit, August 15, 1921. In the final report, the computation will be extended to the date of filing the final report.

PARTNERSHIP ASSETS.

I find that the following are partnership assets in the hands of defendant, L. E. Doan, in which plaintiff, B. T. Dyer, is entitled to a one-half interest upon paying to said Doan the amount herein found to be due from said Dyer to said Doan, namely, 100,000 shares of the Doan Oil Company; 15,000 shares of the Considine-Martin Oil Company; together with a one-half interest in the dividends and other accruals of said partnership [45] property including a one-half interest in 248 shares of the General Petroleum Corporation and a one-half interest in any further or other property paid or to be paid, or transferred to said L. E. Doan, arising out of that certain contract dated April 16, 1920, between the Doan Oil Company, Louis Titus and L. E. Doan and the General Petroleum Corporation.

STATEMENT OF THE ACCOUNT.

On the evidence before me, the accounts of the parties with each other are stated as follows:

DOAN OWES DYER.

One-half dividends on 100,000 shares	
Doan Oil Company.....	\$25,000.00
Interest on above at 7% from 4/12/1920	
to 8/15/1921	2,347.91
One-half dividends Considine-Martin Oil	
Company	75.00
One-half cash from General Petroleum	
Corporation	6,250.00
Interest on above 4/16/1920 to 8/15/1921	582.11
One-half cash from sale 2 shares General	
Petroleum Corporation to Titus at	
\$137.00	137.00
Interest on above from 5/3/1920 to	
8/15/1921	12.28
One-half automobile	1,332.50
Interest on above 3/22/1920 to 8/15/21..	130.11
One-half fee paid Couch by Dyer.....	12.50
Interest on above from 3/22/1920 to	
8/15/1921	1.37

TOTAL, Doan owes Dyer, August 15,
1921 35,880.78

DYER OWES DOAN.

One-half cost 100,000 shares	
Doan Oil Company.....	\$50,000.00
One-half amount received by	
Dyer, Oklahoma lands.....	2,092.50
One-half loss Wehr-Haywood	
investment	300.00
One-half loss Santa Maria Syn-	
dicate	3,553.47
	<hr/>
Total.....	55,945.97
Interest on above 3/22/20 to	
8/15/21 at 7%.....	5,471.80
	<hr/>

TOTAL, Dyer owes Doan,	
8/15/1921	\$61,417.77
Doan owes Dyer Aug. 15, 1921..	35,880.78
	<hr/>

Balance, Dyer owes Doan, Aug. 15, 1921..\$25,536.99

I accordingly find that on the evidence now before me, Dyer should pay to Doan as a consideration for a transfer of a one-half interest in the partnership assets, the sum of \$25,536.99 together with interest thereon from August 15, 1921, until the same is paid.

CONCLUSION.

I recommend:

1. That in lieu of a receiver and in order to stabilize the assets so that the accounting and the decree may not be impaired by transfers, the Court issue its injunction pending final decree, prohibit-

ing defendant, L. E. Doan, from transferring or encumbering more than one-half the said partnership assets; and that said injunction be made permanent in said final decree until said decree is carried out.

2. That a supplemental accounting be had immediately, after service of said temporary injunction directing the Master to find [47] what partnership assets are then on hand in the possession or control of said L. E. Doan and what transfers, if any, have been made, what dividends have been received by said Doan, or have been declared on the shares of Doan Oil Company stock since March, 1920; on the shares of the Considine-Martin Oil Company; on the shares of the General Petroleum Corporation since April 16, 1920, and generally to make such inquiries as may be necessary to bring said accounting as near as may be to the date of the final decree.

3. That in the final decree said defendant be ordered to deliver to said plaintiff duly and properly endorsed so as to entitle the same to transfer on the books of the several corporations, certificates of stock for \$50,000 shares of the Doan Oil Company, 7500 shares of the Considine-Martin Oil Company, 124 shares of the General Petroleum Corporation, or as may otherwise be found on the coming in of the Master's report on a second reference. Provided, however, that said plaintiff shall within ten days after said final decree pay to said L. E. Doan in consideration of said transfers, or to the Clerk of the Court for his account, the

sum found due from said Dyer to said Doan on this accounting or on a further accounting, with interest at the rate of 7% per annum from the date of final decree, interest to cease from date of payment or said deposit with the Clerk.

The foregoing is announced as my draft report herein this 18th day of August, 1921, and the parties may have ten days from date hereof within which to file objections to said report.

H. M. WRIGHT,
Special Master. [48]

Supplemental Report.

On August 18, 1921, the foregoing was announced as my draft report herein and mailed to the respective counsel and counsel were given ten days within which to file objections. Copy of the letter of notification is annexed hereto. The time for filing objections was from time to time extended and the defendant's objections were duly filed on September 13, 1921 and plaintiff's objections were duly filed on September 15, 1921. Said objections of plaintiff and of defendant are herewith separately returned.

Said objections have been carefully considered and each and all the objections of each of the parties are overruled.

The draft report will therefore stand unchanged except for the correction of certain errors not embodied in the objections and except also for the carrying of interest to the date of the final report. The errors referred to are of two kinds: The first

are stenographic errors of transposition of figures, corrected as follows:

Page 28, line 17, \$528.11 is corrected to \$582.11; and page 29, line 7, the figures \$55954.97 corrected to \$55,945.97. The above errors made no change in the totals.

The second class of errors were due to the Master's oversight in carrying out on page 28, the time, "one-half cash from sale 2 shares General Petroleum Corporation to Titus at \$147.00," which was carried out at \$274.00 instead of \$137.00. The interest on the above at page 28, line 20 should, accordingly, read \$12.28 instead of \$24.57. These corrections have required correction of the totals as follows: Page 28, line 27, \$36,030.07 to \$35,880.78; and page 29, line 11, the same correction; and on line 12, \$25,387.70 changed to \$25,536.99; and on page 29, line 16, the same correction [49] as the last one mentioned. The above being changes to correct errors in the draft report as it should have read, I have indicated the same by making the above corrections on the face of the draft report on pages 28 and 29 respectively, in red ink.

It now remains to carry the statement of account on pages 28 and 29 forward to the date of this final report, September 19, 1921, by adding the interest accruing between August 15, 1921 and September 19, 1921. It will be recalled that on page 27, lines 19 to 23, I stated that the calculation of interest in the draft report was temporary and would be extended to the date of the final report. Thus extended, the matter in the draft report beginning

page 28, line 7 and ending page 29, line 18 is now restated to read as follows:

STATEMENT OF THE ACCOUNT.

On the evidence before me, the accounts of the parties with each other are stated as follows:

DOAN OWES DYER.

One-half dividends on 100,000 shares	
Doan Oil Company	\$25,000.00
Interest on above at 7% from 4/12/1920	
to 9/19/1921	2,513.18
One-half dividends Considine-Martin Oil	
Company	75.00
One-half cash from General Petroleum	
Corporation	6,250.00
Interest on above from 4/16/1920 to	
9/19/1921	623.41
One-half cash from sale 2 shares General	
Petroleum Corporation to Titus at	
\$137.00	137.00
Interest on above from 5/3/1920 to	
9/19/1920	14.39
One-half automobile	1,332.50
Interest on above 3/22/1920 to 9/19/	
1921	138.88
<hr/>	
Forward	\$36,084.36

Forwarded	\$36,084.36
One-half fee paid Couch by Dyer	12.50
Interest on above 3/22/1920 to 9/19/1921	1.45

TOTAL Doan owes Dyer, September
19, 1921\$36,098.31

DYER OWES DOAN.

One-half cost 100,000 shares Doan Oil Company	\$50,000.00
One-half amount received by Dyer Okla- homa lands	2,092.50
One-half loss, Wehr-Haywood invest- ment	300.00
One-half loss, Santa Maria Syndicate ...	3,553.47

Total\$55,945.97

Interest on above, 3/22/1920 to 9/19/1921
at 7% 5,841.63

TOTAL Dyer owes Doan, September
19, 1921\$61,787.60

Doan owes Dyer, September 19, 1921 ... 36,098.31

BALANCE Dyer owes Doan, Sep-
tember 19, 1921\$25,689.29

I accordingly find that on the evidence now before me, Dyer should pay to Doan as a consideration for a transfer of a one-half interest in the partnership assets, the sum of \$25,689.29, together with

interest thereon from September 19, 1921 at the rate of 7% per annum until the same is paid.

In all other respects the findings and conclusions in the foregoing draft report are left unchanged.

The said draft report with this Supplemental Report is accordingly settled, signed and filed as my final report herein and the parties notified by mail of said action on this 19th day of September, 1921.

H. M. WRIGHT,
Special Master.

[Endorsed]: Filed Sep. 19, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [51]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 543.—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Defendant's Exceptions to Special Master's Report on Accounting.

Defendant respectfully submits the following exceptions to the Special Master's Report on Accounting in the above-entitled matter on the following grounds:

(1) Exception is made to the report in so far as it holds that 7,000 shares of the stock of Doan Oil Company, in addition to the 93,000 shares originally paid for by defendant, are partnership assets, and that plaintiff is entitled to one-half thereof in accounting to defendant for \$3,500.00 with interest; or that plaintiff is entitled to any dividends which have accrued thereon and been received by defendant.

Withdrawn.

(2) Exception is made to the report in the particular that it does not require plaintiff to account to defendant for one-half of the stock of the North Texas Supply Company, which the evidence shows plaintiff agreed to subscribed and pay for on behalf of the "partnership," and one-half of the salary which plaintiff received from the North Texas Supply Company and from [52] the American Oil Engineering Company.

(3) Exception is made to the report in so far as it undertakes to interpret the decree entered by the Court herein as holding that the stock of the Considine-Martin Oil Company is a partnership asset and in so far as it required defendant to account to plaintiff for one-half of the 15,000 shares acquired by defendant in this transaction; or that plaintiff is entitled to any dividends which have accrued thereon and been received by defendant.

Withdrawn.

(4) Exception is made to the report in so far as it undertakes to interpret the decree entered by the Court herein as holding that the shares

of the General Petroleum Company, or any moneys derived from this transaction by defendant, are a part of the partnership assets; or that plaintiff is entitled to any dividends which have accrued thereon and been received by defendant, and in holding that plaintiff is entitled to one-half of the moneys received by defendant in this transaction and one-half of the proceeds of the sale of two shares of the stock of the General Petroleum Company to Louis Titus, and that plaintiff is entitled to one-half of the 248 shares of stock of this company or any other interest therein.

(5) Exception is made to the report in the particular that it does not allow defendant interest upon all moneys advanced by him from the date said moneys were advanced, as shown by defendant's account heretofore filed with the Master, to date.

(6) Exception is made to the report in the above particulars upon the further grounds that said findings to which exception has been made above are against the evidence and against law, and that said findings to which exception is made [53] as above specified are not supported by the evidence and the law.

WHEREFORE, defendant respectfully submits that the report should be amended in the particulars above specified.

C. W. DURBROW, and
JOHN BREUNER, Jr.,
Attorneys for Defendant.

Receipt of a copy of the within exceptions is hereby admitted this 7th day of October, 1921.

W. H. METSON,

S. C. DREW,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 7, 1921. Walter B. Maling, Clerk. [54]

(Title of Court and Cause.)

**Plaintiff's Exceptions to Special Master's Report
on Accounting.**

Comes now the plaintiff and respectfully presents and submits the following exceptions to the Special Master's Report on Accounting heretofore filed in the above-entitled court in the said cause:

I.

The plaintiff excepts to the said report, and to the findings of fact made by the Special Master, with reference to the second issue of the 33,333 shares of the capital stock of the Doan Oil Company.

II.

The plaintiff excepts to the said report, and to the findings of fact made by the Special Master, wherein it is determined and found that the plaintiff is not entitled to an accounting from the defendant with reference to the second issue of the 33,333 shares of the capital stock of the Doan Oil Company.

The portions of the said Report of the Special

Master to which the foregoing exceptions are directed are set forth therein commencing at line 16 on page 12 of the Report, and concluding with line 12 on page 16 thereof.

The foregoing exceptions are based upon the ground that the said portion of the said Report, and the findings therein set forth, are not supported by law, or by the evidence adduced upon the hearing had before the Special Master.

WHEREFORE, the plaintiff respectfully submits that the said Report should be amended and corrected.

W. H. METSON,
R. G. HUDSON,
Attorneys for Plaintiff. [55]

Receipt of copy hereof admitted Oct. 4th, 1921.

C. W. DURBROW and
JOHN BREUNER, Jr.,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 10, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [56]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

VS.

L. E. DOAN,

Defendant.

W. H. METSON, Esq., Attorney for Plaintiff.

C. W. DURBROW, Esq., and JOHN BREUNER,

Jr., Attorneys for Defendant.

**(Memorandum Opinion and Order for Decree on
Exceptions to Report of Special Master.)**

RUDKIN, District Judge.—I have carefully examined the report of the Special Master in this case in the light of the testimony, the exceptions taken and the arguments of counsel and can add but little to the able arguments submitted by the Master in support of his conclusions. In one important respect, however, I feel constrained to differ with the Master. That is in the disposition to be made of the increased stock issued and sold by the Doan Oil Company. Prior to November 10th, 1919, the outstanding stock of that Company consisted of 300,000 shares of the par value of \$1.00 each, 100,000 of which was the property of the plaintiff and defendant under their partnership agreement as found by the Court. On the above date the Board of Directors of the Corporation offered an additional 100,000 shares of stock, of the par value of \$1.00 per share, for sale, at the price of \$1.00 per share, to be paid for, in [57] two equal installments, on or before December 15th 1919, and January, 1920. This additional stock was offered to the stockholders in proportion to their then holdings, 33,333 shares being allotted to the defendant Doan. It was further provided that if any stockholder failed to subscribe and pay for all or any portion of the stock thus allotted the same

should be subject to the further order of the board. The plaintiff had no notice of this resolution and was given no opportunity to subscribe or pay for the additional stock. The effect of this increase upon the rights of the plaintiff becomes at once apparent. His interest in the Corporation was reduced from a one-sixth interest to a one-eighth interest and his right to participate in future dividends was curtailed in the same ratio. The only benefit the plaintiff could derive from the increase was the addition to the capital assets of the corporation. And if the capital stock of the company was worth more than \$1.00 per share at that time his loss would necessarily exceed his gain. The Master did not deem it necessary to make a finding as to the value of the stock at the time of the second issue, as the assets of the corporation are susceptible of a division in kind, but he expressed the opinion that the stock was worth considerably more than \$1.00 per share, and found that the right to purchase the additional stock was a valuable one and was a partnership asset. The opinion thus expressed and the finding as to the value of the preferred right is fully supported by the testimony. On March 20th 1920, two days before the repudiation of the partnership agreement by the defendant, a dividend of \$200,000.00 on the 400,000 shares was declared, and on the 16th of April 1920, the General Petroleum Corporation was [58] given an 8 months' option on a portion of the property of the Doan Oil Company, or in the alternative on one-half of the capital stock

of that Company, for \$2,000,000.00, payable \$50,000.00 in cash and \$1,950,000.00 in stock of the Petroleum Corporation, at the rate of \$200.00 per share. The \$50,000.00 in cash and 1000 shares of stock of the Petroleum Corporation has already been paid or delivered under the option. From these facts it must be apparent that the right to purchase the increased stock at \$1.00 per share was a valuable one and was a valuable asset of the copartnership. The defendant Doan as a trustee of this stock will not be permitted in equity to derive a profit from his trust, nor will his family or friends, as his nominees, or otherwise. The reason given by the Master for a contrary ruling, namely, that the plaintiff did not have the means to pay for this additional stock is not convincing and does not appeal to me. If the right was a valuable one, as it unquestionably was, little difficulty should be encountered in making the necessary financial arrangements to take up the stock. The 33,333 shares in question will, therefore, be disposed of and divided in the same manner and subject to the same terms and conditions as the original. In all other respects the report of the Master is confirmed for the reasons stated by him, and the exceptions on the part of the defendant are overruled.

The fee of the Special Master will be fixed, and allowed, in the sum of \$3,000.00. A question has arisen as to the payment of this fee in the first instance. Upon this question there is a conflict of authority, some cases holding that the fee should

be paid by the plaintiff, others that it should be paid by the defendant, and still others [59] it should be divided. A partnership of this kind is usually wound up through the appointment of a receiver, and had that course been followed in this case the fee would doubtless be ordered paid out of the funds in his hands. And inasmuch as all the partnership property is still under the control of the defendant, I would order the entire fee paid by him were it not for the fact that the plaintiff is found indebted to the defendant in the sum of \$25,000.00, subject to a further accounting from the defendant since the date of the report, and that sum will, or may be materially increased by the modification here made in the report of the Master. Under the circumstances, therefore, the fee will be divided equally between the parties, each to pay one-half within a time to be fixed by the Court. The question of the form of the final decree was also discussed. A receiver must be appointed to take charge of all the property and assets of the copartnership, unless the necessity therefor is obviated by the imposition of the following terms and conditions with which the defendant must comply:

If the defendant, on or before a date to be fixed by the Court, will deposit with the Clerk of this Court one-half of all corporate stock owned by the copartnership to be issued directly to the plaintiff, or properly assigned to him, no receivership is deemed necessary. Upon the deposit of this stock by the defendant the plaintiff will, on or before a date to be fixed, pay to the Clerk of this Court, or to

his counsel for the use of the defendant, such sum as may be found due from the plaintiff to the defendant, less the cost of this suit as taxed, and upon such payment the Clerk will deliver the stock so deposited to the plaintiff [60] or to his counsel. The plaintiff will recover his costs, and the Court reserves jurisdiction to make such further order or decree as may be necessary in the premises.

It was suggested in the argument that it would be an injustice to the plaintiff to tie up his half of the stock while the defendant is at liberty to use his half as he chooses. But if it be an injustice, it is one that cannot be avoided. Manifestly the Court cannot give the plaintiff full control over his portion of the stock, pending an appeal and it would avail the plaintiff nothing to deprive the defendant of the control of his own portion. Such a deprivation would only be retribution, but retribution is not equity. If it should become necessary, pending an appeal, to vote the stock awarded to the plaintiff in order to protect his rights it might be possible, or feasible, to appoint a receiver for that purpose. But whether a receiver, so appointed, would have authority to vote the stock under local laws I am not advised. Unless the parties agree upon such amounts, if any, as the defendant has received since the last accounting, it will be necessary to refer the case to bring the accounting down to date. I might further say that to avoid tying up a large sum of money for a considerable time, if the defendant prosecutes an appeal herein, the time within which the defendant is required to pay into Court

the sum found due the defendant will be extended until 10 days after the mandate on appeal is filed with the Clerk of this Court.

Let a decree be submitted in accordance herewith. December 2d, 1921.

[Endorsed]: Filed Dec. 2, 1921. Walter B. Maling, Clerk. [61]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the second day of December, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court.

No. 543—EQUITY.

B. T. DYER

vs.

L. E. DOAN

(Order Granting Plaintiff's Exceptions and Overruling Defendant's Exceptions, Etc.)

Plaintiff's exceptions to the Special Master's Report and defendant's exceptions to the Special Master's Report, heretofore argued and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that plain-

tiff's exceptions be and they are hereby granted; that defendant's exceptions be and they are hereby overruled and that in all other respects the report of the Master stand confirmed.

Ordered that the fee of the Special Master be fixed in the sum of \$3000.00 each party to pay one-half. [62]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Decree.

This cause came on to be further heard at this time upon the exceptions taken by the complainant to the report of the Special Master and upon the exceptions taken by the defendant to the Report of the Special Master (which said report and exceptions had heretofore been filed herein) and the exceptions of the respective parties having been argued by counsel and thereupon upon consideration thereof,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

That at all the times herein mentioned the Doan

Oil Company is and was a corporation organized and existing under the laws of the State of Louisiana.

That prior to and on November 10, 1919, the outstanding stock of the Doan Oil Company amounted to three hundred thousand (300,000) shares of the par value of One dollar (\$1.00) each; that one hundred thousand (100,000) of these shares was the property of the plaintiff and defendant under their partnership agreement as heretofore found by this Court in this cause, and that the cost thereof was one (\$1.00) dollar per share; that afterwards and on the said 10th day of November, 1919, the Board of Directors of the Doan Oil Company offered an additional [63] one hundred thousand (100,000) shares of its capital stock of the par value of one dollar (\$1.00) per share for sale at the price of one dollar (\$1.00) per share, to be paid for in two equal installments on or before December 15, 1919, and January, 1920. This additional stock (100,000 shares) was offered to the stockholders of the Doan Oil Company in proportion to their then holdings on November 10th, 1919; that under this offer of additional stock thirty-three thousand three hundred thirty-three (33,333) shares was allotted to the defendant Doan and said allotment of thirty-three thousand three hundred thirty-three (33,333) shares was after said November 10th, 1920, fully taken up either by said defendant or by his nominees at one (\$1.00) dollar per share; that this right to purchase said thirty-three thousand three hundred thirty-three (33,333)

shares of said stock was a valuable asset to the said copartnership.

IT IS THEREFORE ADJUDGED that the defendant Doan account to the plaintiff Dyer for said thirty-three thousand three hundred thirty-three (33,333) shares of stock in the Doan Oil Company, and IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this thirty-three thousand three hundred thirty-three (33,333) shares of stock in the Doan Oil Company be disposed of and divided in the same manner and subject to the same terms and conditions as the original issue to defendant Doan of the said one hundred thousand (100,000) shares of the Doan Oil Company stock which has been and now is determined to be the property of the plaintiff and defendant, and that plaintiff be and he hereby is adjudged to be since March 22d, 1920, the owner of one-half of one hundred and thirty-three thousand three hundred and thirty-three shares of the capital stock of the Doan Oil Company, to wit, sixty-six thousand six hundred and sixty-six and one-half [64] (66,666½) shares.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in respect to this allotment to defendant Doan under said resolution of November 10, 1919, of thirty-three thousand three hundred thirty-three (33,333) shares of stock of the Doan Oil Company, the exception of the plaintiff to the report of the Special Master is hereby sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in all other respects the re-

port of the Special Master be and the same is hereby confirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that subsequent to the acquirement of said Doan Oil Company stock, dividends were paid thereon directly by said Doan Oil Company, to wit: cash dividends, prior to the filing of report of the Special Master in this court in the sum of fifty-cents per share on each share and that other dividends were paid thereon indirectly at the hands of Louis Titus and L. E. Doan by dividing up among the four hundred thousand (400,000) total shares issued of the Doan Oil Company the sum of fifty thousand (\$50,000.00) dollars, and also one thousand (1,000) shares of the capital stock of the General Petroleum Corporation, and that the plaintiff is entitled to his *pro rata* thereof, to wit: one-sixth, the same being cash eight thousand three hundred thirty three and $33/100$ (\$8,333.33) dollars, and also one hundred and sixty-six and two-thirds ($166\frac{2}{3}$) shares of the General Petroleum Corporation. That one and one-half of said General Petroleum Corporation shares have been accounted for by defendant and that plaintiff is entitled to one hundred and sixty-five and one-half ($165\frac{1}{2}$) shares of the General Petroleum Corporation. That plaintiff is entitled to credit for all dividends received by defendant since April 16, 1920, on his proportion of said General Petroleum Corporation [65] shares of stock, to wit: one hundred sixty-five and one-half ($165\frac{1}{2}$) shares, and all future dividends paid by said General Petroleum Corporation thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant did prior to the 22d day of March, 1920, receive fifteen thousand (15,000) shares of the capital stock of that certain corporation named Considine-Martin Oil Company.

That said fifteen thousand (15,000) shares of Considine-Martin Oil Company are and were at all times mentioned a partnership asset and that plaintiff is entitled to seventy-five hundred (7500) shares thereof and to all dividends declared thereon and paid to defendant since defendant received the same,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a receiver be appointed to take charge of the property and assets of the co-partnership unless on or before the 5th day of January, 1922, the said defendant shall deposit with the Clerk of this Court, one-half of one hundred thirty-three thousand three hundred thirty-three (133,333) shares of the corporation stock of the Doan Oil Company and one-half of the corporate shares of that certain corporation commonly known and designated as the Considine-Martin Oil Company, to wit: seventy-five hundred (7500) shares, and also one hundred sixty-five and one-half ($165\frac{1}{2}$) shares of the corporate stock of that certain corporation commonly known and designated as the General Petroleum Corporation. Each of said sixty-six thousand six hundred sixty-six and one-half ($66,666\frac{1}{2}$) shares of Doan Oil Company's stock, and each and every of said shares of Considine-Martin Oil Company stock, and each and every of said shares of the General Petroleum Corporation stock, to be is-

sued in the name of B. T. Dyer, or properly endorsed so that the same can be assigned to and transferred [66] to him.

Should said stock be so deposited with the Clerk of this Court within said time, no receiver will at this time be appointed.

Upon the deposit of this stock by the defendant, IT IS ORDERED that the plaintiff on or before the 15th day of January, 1922, pay to the Clerk of this Court, or to counsel for the defendant, for the use of the defendant, the sum of \$12,645.90, together with interest thereon at the rate of seven per cent (7%) per year from the 21st day of December, 1921, less plaintiff's costs in this suit, as taxed; that upon such payment being made, the Clerk will deliver the stock so deposited to plaintiff, or to plaintiff's counsel, except as provided in the paragraph next succeeding.

Provided, however, that the said defendant shall, ten days prior to the said 15th day of January, 1922, file with the Clerk of this Court a waiver of appeal from the decree herein. And provided further, that if the defendant appeals from the decrees herein, or either of them, then, in that event, the time of the payment by plaintiff of the above sum found due from plaintiff to defendant shall be and is hereby extended until ten days after the mandate on appeal in this suit is filed with the Clerk of this Court, or ten days after waiver of appeal has been filed. And provided further that should the defendant so appeal, then, in that event, it is ordered that the Clerk do not deliver the stock so deposited

to plaintiff or to plaintiff's counsel until ten days after the mandate on appeal in this suit is filed with the clerk of this Court, and then only upon payment of the amount due from plaintiff to defendant to wit: the sum of \$12,645.90 less costs. And provided further that should the defendant so appeal, the plaintiff shall not be required to pay to defendant any interest [67] on said sum of \$12,645.90 less costs for the period of time commencing with the filing of notice of such appeal, and ending with the filing of the mandate on appeal with the Clerk of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event that said defendant has disposed of any of said shares of stock, which he is by this decree directed to deliver to the Clerk of this Court, or is unable to deposit them as directed, that a referee to the Special Master H. M. Wright be and the same is hereby ordered for the purpose of taking testimony and fixing the value of the shares of stock not so deposited by said defendant with the Clerk of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff recover his costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED and the Court hereby reserves jurisdiction to make such further order or decree as may be necessary in the premises.

Dated, December 21st, 1921.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed and entered December 21, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

(Title of Court and Cause.)

Memorandum Opinion on Motion to Retax Costs.

RUDKIN, District Judge.—This is a suit to establish a partnership and for an accounting. Every issue in the case from beginning to end has been contested by defendant and all expenses incurred and disbursements made during the progress of the trial are directly traceable to the controversy between the immediate parties to the suit. After the Court had fixed the rights of the parties by interlocutory decree the case was referred to a Special Master to take an accounting between the parties and upon the filing of his report the Master made application to the Court to fix his compensation. Upon the hearing of that application a question arose as to which of the parties should advance the fees or pay the charges in the first instance. The Court decreed that one-half of such fees or charges should be advanced or paid by each of the parties. At that time the Court was not concerned with the ultimate question of costs and the parties well understood this. Nevertheless when the plaintiff filed his cost bill including an item of Fifteen Hundred Dollars paid by him as his portion of the Master's fee the Clerk's office rejected the claim on the erroneous assumption that the matter had already been determined otherwise by the Court.

In the absence of some controlling equity the rule that the prevailing party is entitled to costs is as absolute in equity as at law and I see no conceivable reason why there should be a departure from that rule in this case. [69]

The motion to retax is therefore granted.

[Endorsed]: Filed Dec. 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 24th day of December, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 543—EQUITY.

B. T. DYER

vs.

L. E. DOAN.

(Order Granting Plaintiff's Motion to Retax Costs.)

Plaintiff's motion to retax costs heretofore heard and submitted to the Court, being fully considered and the Court having filed its memorandum opinion herein, it is ordered that the said motion to retax costs be and the same is hereby granted. [71]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs

L. E. DOAN,

Defendant.

Statement of Evidence.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial before the above-entitled court on the 2d day of December, 1920, Honorable Frank H. Rudkin, District Judge, presiding, the complainant being represented by W. H. Metson, Esq., and R. G. Hudson, Esq., his solicitors, and the defendant being represented by C. W. Durbrow, Esq., and John Breuner, Jr., Esq., his solicitors, and thereupon the following proceedings were had and testimony taken, and exhibits received, and none other:

Testimony of H. F. Berry, for Complainant.

H. F. BERRY, called as a witness for the complainant, testified as follows:

I reside in San Francisco; my business is mining and oil business. I have been in business somewhat over all of this coast for fifteen or twenty years. I know B. T. Dyer, the plaintiff, and L. E. Doan, the defendant. I met Mr. Doan in Shreveport,

(Testimony of H. F. Berry.)

[72] Louisiana, about January 18, 1920, and between January 20th and January 25th met him in his office in Shreveport. I had conversation with Mr. Doan about that time. Between the 20th and 25th Mr. Keller and I went up to his office in Shreveport upon Doan's invitation and he showed us maps and talked over the oil business. I said, "Where is Mr. Dyer?" He said, "He is at Wichita Falls running the supply house there." I said, "Is Dyer interested with you here in your business?" He said, "He is, and I will make him a lot of money." I left Shreveport, went to Houston and returned to Shreveport after a few days and again saw Doan at his office in Shreveport. At that time Mr. Jacob Berger and my brother, C. J. Berry, were present. On this occasion Mr. Berger asked Mr. Doan if Mr. Dyer was his partner there in the oil business, and he said he was.

Cross-examination.

What was exactly said to Mr. Berger at the time to which I last referred was: Mr. Berger asked him if he was a partner, if Dyer was his partner in the oil business, and he said "Yes"; that was the entire conversation relating to Dyer.

Testimony of F. L. Keller, for Complainant.

F. L. KELLER, called as a witness for the complainant, testified as follows:

I reside in San Francisco; my business is the oil business; I know B. T. Dyer and L. E. Doan. I

(Testimony of F. L. Keller.)

remember being in Shreveport, Louisiana, about the first of the year 1920. Upon that occasion I met Mr. Doan about the 18th of January at the railroad station in Shreveport. Thereafter I met Mr. Doan in his office in Shreveport. Mr. Frank Berry was present upon that occasion. We were [73] talking the oil business over and Mr. Berry asked Mr. Doan where Tom Dyer was; he said, "He is up in Wichita Falls, running the supply house." He said, "Well is he in with you here in the oil business?" He said, "Yes, and I am going to make him a lot of money."

Cross-examination.

I have known Mr. Dyer about ten or twelve years; I have had no business transactions with him; just a general acquaintance in the oil business; that is, through the oil fields. I am not interested in any venture with him.

Testimony of Jacob Berger, for Complainant.

JACOB BERGER, called as a witness for the complainant, testified as follows:

I reside in San Francisco and am in the oil business. I know L. E. Doan, the defendant; I first met him last year in C. J. Berry's office, a little over a year ago, in San Francisco. I have known B. T. Dyer for twenty years, and upon friendly terms with him. The circumstances under which I met Mr. Doan in Berry's office in San Francisco were as follows: Mr. Doan brought maps up to C. J. Berry's office to make us familiar with

(Testimony of Jacob Berger.)

the Louisiana oil fields. I am interested with Mr. Berry in the oil business. Well, we were looking the maps over, and I asked him if Mr. Dyer was interested in the oil business with him and he said he was. The maps were of the Bull Bayou field, which is a few miles out of Shreveport. I saw Mr. Doan again in his office in Shreveport and upon that occasion C. J. Berry and H. F. Berry were present. At that time we were making inquiry as regards geologists and drillers in his office there, and while that conversation took [74] place he was telling us what wonderful production he had in the Bull Bayou field; I asked him if Mr. Dyer was interested in this particular production and he said he was.

Cross-examination.

The exact conversation relating to Mr. Dyer on this last occasion was that I asked Mr. Doan if Mr. Dyer was interested in that particular production he had in the Bull Bayou field and he said he was. That was all the conversation, so far as Mr. Dyer is concerned, and that was the exact language, so far as I am able to remember. It was in the end part of 1919 that I saw Mr. Doan in San Francisco. I do not remember the month; it was about a couple of months before I went to Louisiana; I was in Louisiana in January, 1920.

Redirect Examination.

For the purpose of fixing the time when the conversation occurred in San Francisco I remember

(Testimony of F. E. Couch.)

Mr. Doan stated that he was up here on account of his mother's illness. During the conversation in January at Shreveport Mr. Doan told us he had considerable production and he was ready to bring in one more big well at the time I was in his office; the amount of production he had I don't remember, but I know he had considerable production.

Testimony of F. E. Couch, for Complainant.

F. E. COUCH, called as a witness for the complainant testified as follows:

I know L. E. Doan; I met him in the early part of 1919. I know Mr. Dyer; I met him in 1918; I met both in Fort Worth, Texas. I reside in Fort Worth and am in the oil and land business. [75] I have some associates in Fort Worth by the name of E. G. Rall, a grainman, and Mr. Tom B. Owen, a cottonman. I have lived in Fort Worth about ten years. I made a trip with Mr. L. E. Doan; we went to Wichita Falls in the early part of May, 1919, to look over some property in what is known as the Northwest Extension at the Burke-Burnett field; we drove up there by automobile in the early part of May to inspect the property and came back to Fort Worth the same day. The distance from town to town is 115 miles. I had not known Mr. Doan very long at that time; he was living at the Fort Worth Club; I know that because I was up there quite frequently, in the room; the room was Mr. Dyer and Mr. Doan's room, No. 407 in the Club Building; they had a

(Testimony of F. E. Couch.)

double room and roomed together. After that I was with Mr. Doan quite frequently in the room talking about several deals at different times. After the automobile trip with Mr. Doan I was with Mr. Dyer a number of times afterwards in Wichita Falls. I remember the purchase of five acres in the Burke-Burnett field and commonly spoken of as the Lamb piece; the circumstances of the purchase were as follows: Mr. Dyer and I went up to Wichita Falls after Mr. Doan and I had been up there; Mr. Doan said whatever we did was perfectly satisfactory to him; after we got up to Wichita Falls Mr. Doan had wired Mr. Dyer, as I understood it, about this piece, and also talked with him over the telephone; and if I remember the exact date, it was about the 7th of May, Mr. Dyer went out to this field with the owner of this tract to look it over and I stayed at Wichita Falls to look after some other matters, and did not see Mr. Dyer until afterwards in the Hotel—we had a room together—and he told me he had purchased these five acres, Mr. Dyer did. Up to the time that he told me he had purchased the five acres I had not been on them with either [76] Mr Doan or Mr. Dyer. I did not know anything about any well being drilled in that neighborhood until after Mr. Dyer and I went out the next morning, and after he had made this purchase, to see this piece of land; they were drilling a well right close to it. The parties who were drilling this well adjacent to this tract claimed that they

(Testimony of F. E. Couch.)

were not deep enough to get the pay. The morning that we went to the Lamb tract, after Mr. Dyer had purchased it, they were drilling this well. I did not tell Mr. Doan that I had told Mr. Dyer before Dyer purchased that well that there was an offset well adjacent to the Lamb tract in salt water. At the time I was there with Mr. Dyer I made a purchase of some acreage right across the River from this Extension, in Tillman County, Oklahoma. The River makes a bend there; it was the dividing line between Oklahoma and Texas. I told Dyer that if he and Doan wanted to share in the purchase of this, it was all right with me. In one of his conversations over the long distance with Doan in Fort Worth he told him what I said, and he said it was perfectly all right. There were supposed to have been 80 acres in that tract of land, but it was a little shy; it measured a little over 75. Title to that acreage was taken in the name of Mr. Tom B. Owens, my associate. It cost \$125 an acre, or a total of between \$8,000 and \$9,000. When I made the purchase that night, Mr. Dyer and I were out in front of the hotel with the owner of this lease and I gave him \$1,000 as earnest money, until the title was examined; I turned the papers over to Mr. Dyer; I went back to Fort Worth that night; I told him to take them to Judge Kay, an attorney in Wichita Falls, and have him examine the title, and he did so. After I went back to Fort Worth Doan was going to Wichita Falls and he told me that if the title was all right he would pay the

(Testimony of F. E. Couch.)

balance and when he came back to Fort Worth I could give him my [77] part of it, which was half, and I did so. My side paid one-half and Doan and Dyer's side paid one-half, which was in the neighborhood of \$4,000, or a little over, for each side. The land was sold afterwards. In the early part of June forty acres were sold and I made out a check to Doan for their half for \$5,400, less \$12.50 attorney's fees, making net \$5,387.50. The land was sold in three pieces.

Mr. METSON.—Q. I show you a letter and ask if you can identify it.

A. Yes, this is from Doan to me.

Mr. METSON.—We offer this letter in evidence as Plaintiff's Exhibit 1.

Plaintiff's Exhibit No. 1.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., December 17, 1919.

Mr. F. E. Couch,
Flatiron Building,
Fort Worth, Texas.

My dear Couch:

I received a letter from Mr. Dyer stating that you had an offer of three hundred dollars per acre for our Tillman County Acreage. Please use your own best judgment, and if you think it advisable at any time to sell, I will be perfectly satisfied.

I notice by the daily reports all kinds of rumors in regard to Tillman County. I have not seen any

(Testimony of F. E. Couch.)

thing definite about any wells coming in, so I leave the matter entirely in your hands.

With kindest personal regards, I remain

Very truly yours,

L. E. DOAN.

LED/K. [78]

Q. I will show you another paper and ask you whether or not you can identify that.

A. Yes, that was a check that I gave Dyer for their half of the second sale of twenty acres, which was in February of this year.

The document was marked Plaintiff's Exhibit 2.

Plaintiff's Exhibit No. 2.

Fort Worth, Tex., Feb. 3, 1920.

No. 4988.

THE FORT WORTH NATIONAL BANK 37-5

Pay to B. T. Dyer or order \$2600.00 Twenty-seven hundred dollars Dollars.

TOM B. OWENS & CO.

By Joe F. Bailey.

1/2 Int in Sale of 20 Acre Tillman Co. Okla

(On Margin: "Tom B. Owens & Co. Cotton."
Endorsed: "Pay to Doan Oil Co. B. T. Dyer."
"Pay to order of First National Bank, Shreveport, La. Doan Oil Co., Inc." "Pay to the order of any bank, trust or express company. 84-2. Feb. 11, 1920. 84-2. All previous Endorsements Guaranteed First National Bank, Shreveport, La." "19 Received payment through Clearing House. 19.

(Testimony of F. E. Couch.)

Feb. 13, 1920. National Bank of Commerce, Fort Worth, Texas.'')

The acreage was sold in three tracts; the first forty acres were sold for \$300 an acre, less 10%; the other two tracts were sold for the same amount, less 10%. Doan went down to Louisiana and he told me that at any time Dyer and I wanted to sell the tract of land it was perfectly all right with him. The whole acreage was thereafter sold. I had several conversations with Doan respecting Dyer in Louisiana at different times. I remember I talked with him in July and August; he had been down to [79] Louisiana on several trips; this was in 1919. Doan showed me the maps of Louisiana where he had made some purchases at different times; in fact, he tried to get me to go down there with him on several occasions. I remember that in one conversation he stated that he and Tom were going to make a lot of money down there in Louisiana.

Cross-examination.

Doan and I went up to Wichita Falls to look at a piece of property in the Burke-Burnett District. It was known as the Burke-Wagner property and did not relate to the five-acre piece that was subsequently purchased. After Dyer purchased it I accompanied Dyer to the Burke-Burnett District and went out on the well which was being drilled in the vicinity of this five-acre tract. I did not accompany Dyer prior to the time that the purchase was made, and at no time considered joining Doan in its purchase. I never had any inten-

(Testimony of F. E. Couch.)

tion of investing in this five-acre tract; I had not seen it before it was purchased and had only heard Dyer and Doan talking about it. I made the initial payment on the Tillman County purchase of \$1,000 with the consent of Doan. I told Dyer I had bought some acreage over there for \$125 an acre and if he and Doan wanted half of it they could have it. Dyer told Doan over the telephone that I told him they could have it and he said it was all right. He said that to Dyer over the telephone and I was in the room at the time. Doan finished the payment and when I came over to Wichita Falls I handed him the difference.

Mr. DURBROW.—Q. I show you a check, dated May 10th, 1919, made to the order of R. O. Roy, for \$8060 and ask you if that was the check that was issued by Mr. Doan in final payment of that Tillman County [80] property.

A. I was not present; that looks like the signature of Mr. Doan.

Q. Who is Mr. Roy?

A. Mr. Roy was the man who owned this lease, as I remember it.

The COURT.—There seems to be no dispute over the fact that Mr. Doan paid the balance.

Mr. DURBROW.—I wanted to know if this was the check signed by Mr. Doan individually.

A. (Continuing.) This is his signature; as I remember it, Roy was the name of the person from whom I purchased.

(Testimony of F. E. Couch.)

Redirect Examination.

With respect to other deals with Doan and Dyer respecting oil properties, I bought 100 acres from them out in Stevens County, in March, 1919. I don't remember if that was before or after I met Doan. I had my dealings with Dyer. The amount of the transaction was \$30,000 and the profit of Dyer and Doan was \$7,500. This was told me by the party who had some transactions with Mr. Dyer and he told me what it cost him and Mr. Dyer told me also. I did not discuss the matter with Doan.

Testimony of W. L. Leland, for Complainant.

W. L. LELAND, called as a witness for the complainant, testified as follows:

I reside in San Francisco and am in the mining, oil and farming business. I have known Dyer eighteen or nineteen years and have [81] been friendly with him. I have known Doan, I think, more than a dozen years, in Bakersfield, here and in Texas. I saw them in Texas many times, nearly always in the Fort Worth Club in their rooms at the fourth floor; I first met them in Fort Worth in March, 1919; I met Dyer there in February, 1919, and then came back here and returned there. I had conversations with Doan respecting Louisiana at Fort Worth; sometimes Dyer was present, other times not. I was in their rooms nearly every day, two or three times a day sometimes. More than half the time I saw them they would be together; they would be in their rooms there, and I would talk with them

(Testimony of W. L. Leland.)

an hour or more, sometimes. Shortly after Doan made his trip to Louisiana when he bought the forty acres from Greer and Clark, and then on subsequent trips he made down there, I had conversations from time to time with him referring to Louisiana properties. It was pretty early in April when he made the first purchase. He showed me maps when he came back. He suggested that I buy an adjoining piece and I went down and looked at the land. The Greer and Clark land is in the Bull Bayou District. The first conversation, I think, was in the morning that he returned from Louisiana back to Fort Worth. It was in his room in the Fort Worth Club, in showing me a map which he had, he told me the land which he had bought and marked it out in red and stated what some adjoining lands could be bought for and pointed out different wells that had been put down in that neighborhood and their history and gave his opinion that he had made a splendid bargain and that I should go down and get some land myself, and I went right down there for that purpose. Regarding Dyer, he said, "Tom and I are in a way to make a lot of money down there." Subsequently, I had many conversations with Doan with respect to Dyer and the [82] Louisiana properties. Every day or two, after he made his first purchase down there, I was in the room at Fort Worth, and especially after he made his second trip he was very enthusiastic.

Mr. METSON.—Q. Was there anything said by Mr. Doan about eyes bulging out or your eyes bulg-

(Testimony of W. L. Leland.)

ing out or anything of that kind said at that time?

Mr. DURBROW.—I object to the question as leading.

The COURT.—He may answer.

A. He stated, "Tom's eyes would bulge if we would sell at the prices that had been offered, to see how much money we have made already, but I don't think we should sell," and he did not sell.

Cross-examination.

As nearly as I can recall it, the exact words made by Doan upon making that last statement were, "Tom's eyes would bulge out," or "Stick out"—Mr. Dyer was not there—"would stick out if he knew how much we could sell this for, and the profit we would make." This particular piece of land he had in mind was the first forty acres that was bought. I think that statement was made after Doan made his second trip to Shreveport; I don't know when, but it was two or three weeks later than his first trip. I have known Dyer eighteen years, and since August, 1918, I have had one small deal with him; I closed the deal. I purchased for \$35,000 a ten-acre piece northwest of Eastland; I was shy of money to pay the full \$35,000; I have other associates; I asked Dyer to come in; he said, "I just can't see my way to do it." I asked him many times; finally he helped me out and gave [83] me \$2,000, but I understand he sold out to other people at the same price he gave me.

Deposition of Albert S. Leach, for Complainant.

ALBERT S. LEACH, called as a witness for the complainant, testified as follows:

I reside in Fort Worth; have lived there for forty-one years. I am in the oil business. I know the parties to this suit; I met them some time in the spring of 1919; my recollection is that I met Dyer first, possibly a little while before I met Doan. I met him in my office at Wichita Falls; I met Doan there also. Doan either came to my office with Dyer, or with Couch. I know a piece of land at Wichita Falls—a five-acre tract, popularly known as the Lamb Tract. I know that Dyer and Doan bought it about the time that I met them. Doan talked to me in a general way about the land, before the final payment was made. As to what Doan said, as I remember it, I showed him the map of the tract as it lay between the Humble Well in Block 58 and the Golden Cycle Well and the Bert Wagner Well over there Northwest—it was on a direct line between the two. He said, “I don’t see how there could help but be oil in there.” The Golden Cycle was a producing well. My impression was that it came in possibly 2500 or 3000, or may be larger, but I don’t think so. That is considered a good well. I don’t know what the size of the production of the Humble well was. The Bert Wagner well was one of the big wells in the Northwest field; in fact, the discovery well. It was estimated from 3 to 5,000 in its first production. Doan showed me on the map that the

(Deposition of Albert S. Leach.)

Lamb land lay in a direct line between the two wells. I am sure that we had a conversation about that because I know they told me that they were going to [84] make this other \$30,000 payment, or make the last payment on it. Doan did not talk to me much about that tract; it was mostly in a general way. I was in the brokerage business at that time and he was interested in getting something good. I can't say he asked for any specific information, but only talked over that section in a general way. With reference to any deal in that land, afterwards I made a deal on it, or they made a deal on it through me. The deal was never consummated; it did not go through, but they made a contract and the purchasers fell down on the money. As I remember it, the price was \$80,000 that it was sold for, and it was about \$40,000 or \$50,000 cash, and I think there was to be some stock. That deal must have been along in the fall—a few months after they purchased it; the deal that fell through was, I would judge, a couple of months after they bought it. It must have been about September of 1919. As to other business, I handled 80 acres of land across the River in Tillman County that they were interested in; that was 80 acres, or a little short; that was in April, 1919. I made the deal with Couch; Couch agreed to take it and then told me that Doan and Dyer were coming in with him on the purchase. It was purchased, I think, at \$115 or \$125 an acre. I talked to Doan about that; I dealt mostly with Couch and Dyer;

(Deposition of Albert S. Leach.)

Doan was not staying at Wichita Falls. Dyer had a room out at the house where I was living and I saw him very frequently when he was there. When he first came up there and took a room out where I was he was putting in the North Texas Supply Company. He and Mr. McLean got a room out there together. With regard to the sale of the tract of land in Oklahoma, I sold it all. There were three different sales made at \$300 an acre. I took up the sales of that property principally with Dyer and Couch. [85]

Cross-examination.

Dyer moved out to the same house where I roomed; I think he got a room at this house when he opened up the Supply Company. My impression is that was early in the fall. I dropped down at the office of the Supply Company once in a while. Dyer was not always there when I dropped in. I never sold for Dyer any other property than the tracts known as the Lamb tract and the Tillman County property. I never had any other dealings with him as a broker. The Lamb tract was not over half a mile from the Golden Cycle well, possibly three-quarters of a mile. The Burke-Wagoner was on a little further northwest. The Humble well was a little southeast of it; I suppose half or three-quarters of a mile. The next well was being drilled at that time. It was an offset to the north. My impression is that it was in the five-acre tract adjoining it on the north. It eventually came in as a salt water well. There

(Deposition of Albert S. Leach.)

were other wells closer to the Lamb tract than the three wells I have named. I attempted to sell the Lamb tract as agent for Doan and Dyer. There was a contract made for the sale of it. The payment was to be made within ten days, but it was never made. Before Dyer put in the Supply Company he made his headquarters in Wichita Falls at my office. I finally sold the Tillman County property at \$300 an acre. The first two checks were paid over to Couch. The other check we gave to Dyer. He happened to be in the office when the deal was closed. [86]

Redirect Examination.

At the time the Lamb tract deal was closed there were several wells drilling; they were not finished wells; to the southeast was the Humble well and that was a producer.

Deposition of Mestre Olcott, for Complainant.

MESTRE OLCOTT, called as a witness for the complainant, testified as follows:

I reside in Tulsa, Oklahoma. I have been in the oil business for seven years. I lived at Fort Worth for eight months and have lived in and about Shreveport, Louisiana. I have known Doan and Dyer both about a year and seven months. I remember a business transaction with them; Dyer and Doan bought a lease from me in Eastland County, Texas, north of Cisco, 240 acres; a broker named Whitney introduced that transaction; the day they came to my room I agreed that I would

(Deposition of Mestre Olcott.)

sell them this lease provided they would enter into a preliminary contract to show their good faith—I believe the next morning the agreement was drawn up and also a check of \$500 given to me by Dyer, and this was for the examination of the title—a period of ten days—and the title was approved and the lease paid for that day at the First National Bank; \$15,000 was involved. The assignment of the land was made to Dyer. Afterwards I resold all of it, except twenty acres. I kept in touch with Dyer and deposited the money in the bank, I think to Doan's credit. I sold a lease for Doan in Louisiana and I offered Dyer two leases in Texas, one in the Burke-Burnett field and the other near the Hill well. Dyer signified that he was not interested in them. The 220 acres were sold for \$100 an acre; that is what they got net. I saw Doan in Shreveport quite often. After my arrival in Shreveport on Oct. [87] 1, 1919, I had a conversation with Doan and asked him if Dyer was not coming down to Shreveport with him, and he said that he was going to take care of the Texas end of their business and he was going to take care of the Louisiana end of it. I don't think anyone else was present at that conversation, and it was pretty soon after my arrival. Doan and Dyer had what seemed to be a combination of room and office on the 4th floor of the Ft. Worth Club. The 240 acres was assigned to Dyer. The first payment was made by Dyer and the balance by Doan.

Deposition of Edward J. Buckingham, for Complainant.

EDWARD J. BUCKINGHAM, called as a witness for the complainant, testified as follows:

I have resided in San Antonio for about fifteen years, and for the last two years have been in and about Fort Worth at times. I am engaged in the oil business at present and have been exclusively for two years. I know Dyer and have known Doan about two years. I have talked with Doan about Louisiana properties. About a year ago I had a conversation with Doan at which Dyer and some other man, whose name I don't remember, were present. It was in the dining-room of the Fort Worth Club. Dyer had spoken to us with reference to some land which he said he and Doan had in Louisiana, and he said that they had a 320-acre tract that was about three or four miles from a tract of land which they had secured and a well had just come on, and he thought that would be a very good buy; he priced the property to me at \$50 an acre, but said that he wasn't familiar with it and he wanted me to come down and meet Mr. Doan in the evening—our President was here then from Chicago, and we talked it over and went down in the evening to talk it over with Doan. He was in the dining-room at the Club and he described the property to me in a little different manner from that which Dyer had spoken of, and after consideration with our president we decided that it was a little too [88] high, and too far from production to be what we thought

(Deposition of Edward J. Buckingham.)

we could handle at that time. I had a conversation later with Doan at the elevator in the Westbrook Hotel in February of this year. Nobody but Doan and myself were present. We were waiting for the elevator. I asked if Dyer and himself were still partners. I saw that Dyer had gone into the American Oil Engineering Company—and he says, “Yes, we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end.” I did not buy the 320 acres at all.

Deposition of L. E. H. De Sallier, for Complainant.

L. E. H. DE SALLIER, called as a witness for the complainant, testified as follows:

My home is in Venice, California. I have been in Fort Worth from time to time since last January. I am now residing in Texas, first one place and then another through the oil fields. I have known Dyer and Doan possibly about ten years. I have known Doan in Texas. I first saw him there in March or April, 1919. At that time I had many conversations with him. I remember a conversation respecting oil lands in and about Wichita Falls. I had a conversation at Fort Worth with Doan which was general and *would up* finally by my trying to interest them in oil lands. I believe Doan stated—in regards to the lands in Tillman County, that he could not reach any decision and for me to see Dyer, his partner, in Wichita Falls, and he asked me if I knew him, and I said, “Yes, I have known him for years.” I had a conversation

(Deposition of L. E. H. De Sallier.)

with him later at Wichita Falls in regards to some Tillman County lands that he and Dyer were interested in. Doan stated that in regards to that land he did not wish to make any price—set any price for sale until he had consulted Dyer. [89]

Deposition of A. T. Jergins, for Complainant.

A. T. JERGINs, called as a witness for the complainant, testified as follows:

I reside in Fort Worth, Texas. I have resided there for two and a half years. My occupation is oil, oil-producing, drilling oil wells and operating, and have been so occupied since 1908. I have been around Fort Worth for two and a half years continuously. I have known Doan about ten years. I became acquainted with him first in California. I have had conversations with him in Fort Worth, Texas, respecting oil lands. I have had oil leases or options in the Desdemona District. At the Westbrook Hotel in Fort Worth I had a conversation with Doan at which Dyer was present, and I put a proposition up to them, and they said it looked pretty good; if I remember correctly the reason they did not want to go into it then was the fact that Doan said he had just gotten here and he wanted to look the field over and get acquainted with the values, and that he would see me in a day or two—something like that, and then we went into an office there, I think Mr. Pyron's office, and then I left them to see them a day or two afterwards, and the final decision, as I remember, was

(Deposition of A. T. Jergins.)

the fact that Mr. Doan told me that he had just gotten here and that he had not familiarized himself with the values or conditions, and that the matter required such haste, we would have to count them out. I had a conversation later regarding a tract of land in Comanche County. I took this matter up first with Dyer. He said to see Doan about it. Then I took the matter up with Doan and we talked it over and he said that the proposition looked pretty good, but that Tom (Dyer) was in the field and that he had not talked the matter over with him and that he left those [90] matters of buying property more or less to his judgment; that Tom looked after that end of it, and that he looked after the inside, and that as soon as he came back here, he would talk it over with him and see what we could do on that. I did not take the matter up with them again. I had other dealings with Doan and Dyer; I presented a forty-acre tract in the same district; I took that up with Doan and his remarks were, that this looked all right, but we are—we have got several properties on and I wouldn't want to make a deal without taking the matter up with Tom, you see; as I told you before, these propositions—I pass these propositions up to him; we are partners in our dealings here, and that he looks after—it is up to him to pass on the outside, on the purchase of the property.

I had a block of 6500 acres in the south part of Comanche County, in which I had made a deal with the Lone Star Gas Company to drill a well on it—

(Deposition of A. T. Jergins.)

a test well, and they left me a certain acreage, and I met Dyer one day and told him I had a lease in this district; that the Gas Company was going to drill a well there, and if he could sell any of that for me—he asked me the price and where it was located, and I told him; he came back shortly afterwards and told me he had sold two 160 acre tracts, and if I remember correctly the amount paid to Dyer as a commission on the sale of the two tracts was \$1600. I paid that by check to Dyer. The check was in his name. I had a conversation with Doan regarding Louisiana. It was about the same time that Dyer was organizing a supply company at Wichita Falls during the year 1919. The conversation took place in the room of Doan and Dyer. Doan, Dyer and myself were the only persons in the room. Doan had returned from Louisiana. He had a map of the oil fields and we were talking about conditions there, *and* [91] and I put the proposition up to him whether or not he wanted me to come in on it and he said, “Well, I think I have got it all financed.” He said, “We have taken the matter up with different people in San Francisco,” and I asked him if Clarence Berry was one of names in with him on it, and he said no, he wasn’t, and he made the remark that “Here is where we are going to make a cleanup,” and that they had been offered a profit on one of the tracts that he had acquired. As to the names he said that were financing it—to the best of my recollection, he mentioned the name of

(Deposition of A. T. Jergins.)

—mentioned the fact that Mr. Lucey and someone else was with him in the deal.

Q. Do you recall the name of Titus?

A. Well, yes, I think that is the name.

Q. Did he state whom he referred to by the word "we"? A. No, sir.

The Comanche transactions were during the months of April, May, June and July, 1919.

In the conversation with reference to Louisiana I asked Doan if I could get in on it and he said, "I think we will get the matter all financed." He said, "Lucey and Titus are coming in with us, and I think we won't need any more money.

Testimony of B. T. Dyer, for Plaintiff.

B. T. DYER, called as a witness for the complainant, testified as follows:

I reside in San Francisco and am in the oil business, and have been so engaged about ten years all over the country, California, Texas, Oklahoma and Louisiana. I have been connected with the General Petroleum Company of California and have operated for myself and others. I know the defendant, Doan. I had many conversations with him in 1918. I received a telegram from J. F. Lucey, which I showed to Doan in our office in the Balboa Building the time it bears date.

Mr. METSON.—[92] We offer the telegram in evidence.

Mr. DURBROW.—I object to the introduction of the telegram, as irrelevant.

The COURT.—It is only preliminary, anyhow.

Mr. DURBROW.—Exception.

(Telegram was here marked Plaintiff's Exhibit 3.)

Plaintiff's Exhibit No. 3.

(WESTERN UNION TELEGRAM.)

“Received at SE Corner Pine and Montgomery
Sts., San Francisco

P Houston Tex 1235 P Mar 29 1918

B. T. Dyer

Balboa Bldg

San Francisco Calif

It is consenses of opinion that Ranger fields lying between Ft Worth Brownwood Coleman offer possibilities as great as Oklahoma Have just driven through field and this is my own conclusion Am so impressed that have authorized installation two stores at Ft Worth and Ranger Believe you and Doane could make great success but question the advisability of you coming aline It requires two You and Doane have the necessary combination of ideas and energy to make good In my opinion there would be no question about you doing so although all large eastern companies as well as mid continent and Texas are represented We will perhaps see the greatest drilling campaign in the vicinity of the prospective fields in the history of the country I saw one very excellent well producing fifteen hundred barrels of thirty-six gravity oil and possibilities are very big and the extent of the

(Testimony of B. T. Dyer.)

field so great that it is difficult to describe them to you in this wire

J. F. LUCEY.

130PM." [93]

Some time after the receipt of that telegram I went back east for a trip, was in New York, and then came back here, and then I went away. I sent a telegram to Doan, of which the document shown me is a copy and dated May 9, 1918.

Mr. METSON.—We offer this telegram.

Mr. DURBROW.—I object to the introduction of that telegram as being irrelevant and self-serving declaration.

The COURT.—It is only preliminary; it does not tend to show a partnership, perhaps, but it shows the relations of the parties; I admit it for that purpose.

(The document was marked Plaintiff's Exhibit 4.)

Plaintiff's Exhibit No. 4.

(WESTERN UNION TELEGRAM.)

"New York May 9 1918

L. E. Doan

Balboa Building

San Francisco California

Carr and Lucey here Carr just from Texas They report Texas wonderful Lucey says had we come when they wired we would have made more than we would have made in California They report while many lessors are active there is still

(Testimony of B. T. Dyer.)

splendid opportunity on account of area of field proving daily Talk this over with Fleishakker if you think best See if he is interested go in game with us otherwise believe Toronty crowd will back me Advise him Wyoming deal made Will likely be home last of week

B. T. DYER."

I was in Texas five or six weeks on a preliminary trip, going back in the latter part of August, 1918. In the latter part of August, 1918, I saw Doan many times in San Francisco at our offices in the Balboa Building. I had many conversations with him [94] with respect to business relations between us. After I returned from Texas, what was said between us respecting the oil business was in substance as follows:

I said, "Larry, there is a wonderful field over there; I made this preliminary trip, and Lucey's telegram did not exaggerate at all; I started in at Houston, covered some of the Coastal Field, and the Goose Creek Field, saw how they were drilling there with rotary down 2800 or 3000 feet, and of the wonderful, big wells they were producing there that we didn't know of in California and didn't hear of; that I went from there on up through Eastland County to Ranger, Stevens County, into Fort Worth; I saw them drilling at Eastland, which was all standard tools, that they are drilling there remarkably quick compared with our California drilling at the same depth, and getting some wonderfully big wells; and at Fort Worth, which is

(Testimony of B. T. Dyer.)

the headquarters of the present activity, the brokers and the land dealers and the lessors are making a world of money, that they are taking options on leases and reselling them for a profit, a big profit, sometimes holding out portions of the leases, and everybody seems to be making money, it is a wonderful spot; and that I went on to Wichita Falls, which is a different character of country from Eastland, and I saw them drilling there, using rotaries, that that country is a sand country, that they are getting good wells there, and the excitement is started there, they are doing big trading there; and on through Oklahoma, up as far as Tulsa, where they were getting wonderful wells there; the opportunities are so big that I am going back, and we ought to go back and get in the game, I am going back anyway."

Doan, after considering this, told me that he had a lawsuit on here, I think regarding some family affair, and he was doing [95] something about his taxes, and he said, "I will come back with you as soon as these are cleared up, you go on back and if these people here, who are very enthusiastic, won't come in and help us finance, we will work this out carefully and be very careful what we do, and I am sure we can make money; I will follow you up as soon as I can get these matters cleared up, we will go back there and hit the ball, and I will come back in two or three weeks and help, and we will divide our profits; if these people out here are not enthusiastic, I will get Mr. Titus, who will prob-

(Testimony of B. T. Dyer.)

ably join us, I can always bank on him, possibly you can get Lucey; I don't want to jeopardize my whole fortune, but we will work this out very carefully and conservatively, and when we get something we can absolutely bank on I am sure we can get the financial help of Titus and Lucey, and some of these people here; you go ahead."

I did so. In two or three weeks he followed up. He told me to get matters in shape and see what I could learn about the fields.

The above was many conversations. After that period of time I went back to Fort Worth. I think it was in October, or maybe September, I immediately started in to look over the country and chase down whatever leases we had been offered. There were many of them offered. I learned the way they handled the business and got acquainted with people and companies. It was considerably different from the way we operated down here, and you had to be careful the way you jumped in. Doan stayed in California some weeks after that; I think it was possibly in November when he came over there. He came to Texas after I did; I should say three or four weeks after. We had a room together at the Westbrook Hotel to start with, and later [96] we joined the Fort Worth Club and took a room there. I am not positive when we went to the Fort Worth Club, but it must have been in March, 1919. Doan and I were interested in business transactions in Texas together. The first transaction was the purchase

(Testimony of B. T. Dyer.)

of considerable acreage in Bosque County, what we call "wildcat leases," which lay on the head of a production; it looked like a production was coming to it. That was taken in November, 1918, by Doan and myself, in Doan's name. In March, 1919, we sold the most of them to the Gulf Production Company, of whom Walter Pyron was manager and with whom Leslie Spoons was connected. These leases we disposed of at a profit. There was also a deal in Eastland County. Doan wrote me the following letter:

Plaintiff's Exhibit No. 5.

(Letterhead of L. E. DOAN.)

San Francisco, Cal., Aug. 9th, 1918.

"My dear Tom:

Recd. your letters of the 4th this morning—with clipping enclosed—I am thoroughly satisfied that there are many opportunities in that Country and you are on the right line—It takes big money however to do business and without it all you could expect to do would be to turn something on a commission basis—And as you know from past experience it is hard to land a commission deal—I have been thinking hard about the whole thing—and have tried to make up my mind what is the best way to handle the situation and I have about come to the conclusion that our first hunch was the best—Things move so fast in the oil country, that, without money to plank down on options it is almost impossible to do anything. One cannot go out on the street and get people to put up

(Testimony of B. T. Dyer.)

money on [97] short notice to buy options so far away no matter how desirable they may be and if you do succeed they want all the profit. Personally I cannot afford to take a chance—between income Taxes and other losses & expenses this past year I will have to conserve what I have left—At my age I cannot afford to go broke and be looked upon as a has been—I think I am going to get by on income tax for about \$17000.00 and may be less. Titus was here and we made a showing which they can't get by—I am to have a further hearing on the 15th and the agent here intimated that he would cut out excess profits tax and put me on the same basis as the rest of the syndicate—The rest of it will have to be decided in Washington. Titus left for Washington yesterday—He certainly knows how to handle himself—I spoke to him about oil—He says he is in so many things that he does not care to take up anything new—but would always take a shot for a small amount—He has a big 100,000 acre real on in Missouri and Kansas which some parties have put up to him. He wants me to handle it if he goes into it any further—He will get more dope when he gets to Washington and let me know about it.

I am satisfied Tom that we must first raise at least \$100,000.00 before we can expect to do any business—We must have the money first. It is alright to look the field over and get a line on propositions—but we must have the money—It cannot be raised as I said before on short notice—

(Testimony of B. T. Dyer.)

If they carry us for 25% and expenses—That is as much as we can expect—As soon as you have some good things lined up so we have something to talk about, we should then get busy and raise money—I hate the idea of going to Fleishacker & Coneston and yet we may have to do it. I think Clarence will go in soon as he returns [98] from Alaska—about the 15th inst—Lucey and Titus will go and we can get others—We must have a finished deal so we can act without hindrance or delay.

The Associated have not yet decided on Santa Maria—I have made up my mind to wait until Monday and then if they are not ready to pull the pipe and sell out—

I fully appreciate all you are doing. The information you are getting will be valuable—but we must get together and get the money.

Emery will graduate on the 17th. He will probably have a two weeks furlough and come home—Had a letter this morning—Says everything is O. K. with him.

Kindest regards,
DOAN."

With regard to a transaction between Doan and myself in which Paul Shoup was brought in, I had tied up about 45,000 acres of leases in West Texas in Garza County, and they looked favorable and I offered them to Fred Ripley and Max Whittier, who took it up with the Associated Oil Company, and, in turn, it went to Shoup, who was an officer of the Associated, and he had a geologist

(Testimony of B. T. Dyer.)

make a report. I kept after them and got Doan to try and hurry them along. The deal was not completed because a favorable report was not made. My recollection is, Doan wrote me a letter that he had seen or would see them.

There was a business transaction between us in Eastland County, Texas, of 240 acres. The deal was made through Olcott. A written contract was entered into, dated March 14, 1919, between myself and Olcott, with reference to those 240 acres.

The contract was introduced in evidence as Plaintiff's Exhibit 6. [99]

The contract provides in substance for the sale from Olcott to Dyer of an oil and gas mining lease covering 240 acres in Eastland County, Texas, for a total purchase price of \$15,600, or \$65 per acre. It provided that \$500 be deposited with the Bank together with the assignment of the lease as earnest money, and purchaser to have ten days to examine title; if title acceptable the balance of purchase price to be then payable.

There was a profit of about \$6400 on that deal. We paid a commission by giving twenty acres to the man that brought it to us. There was a deal in Oklahoma later. We went in with Couch and took a lease in Tillman County, Oklahoma. There were supposed to be eighty acres, but it measured up short. I think 75½ acres; the total payment was \$9060. They were afterwards sold. The purchase was about the 7th of May. I was at Wichita Falls. Mr. Couch was there. Mr. Doan

(Testimony of B. T. Dyer.)

was at Fort Worth. About the same day we had just taken five acres of what we called the Lamb tract in the Burke-Burnett extension. Doan wanted me to look at that piece while I was up there and he wired me not to lose it unless I saw something better. I went out to look it over and I could not see why it would not be a good lease. It lay right in between a development in the town and what they call the Northwest Extension, and it was in the same section with a well that was supposed to make 2500 to 3000 barrels, and it looked awfully good, and I bought it and made a \$10,000 payment to hold it. The purchase price was \$40,000. That payment was made in Wichita Falls. Mr. Doan was in Fort Worth at that time. Couch was in Wichita Falls at that time, but was not with me when I bought it. Two or three days later Doan came up to Wichita Falls and went out over it with me. After the purchase I went back to Fort Worth. Mr. Doan went with me. After that [100] Doan made a trip to Louisiana. I think it was fifteen days after the first \$10,000 were paid, we had to pay the \$30,000. Doan came up and arrived in Wichita Falls, I think, on the day that it was due. I don't remember whether we went out to the Lamb tract on the day it was due or not; I think we did; I think we drove out in the morning and came back about noon. The off-set well was being drilled and there was some question whether it was a good well or a dry well. In the two weeks that we had it we inquired a

(Testimony of B. T. Dyer.)

good deal and tried to learn the facts about it. I was a little nervous about it. Doan and I conversed with respect to the payment. I said, "Larry, I don't think we had better make this \$30,000 payment, we had better take a loss, let it go by default, because I can stand my share of the loss of the \$10,000 better than I can of the \$40,000." He said, "What? You have not lost faith in that, have you?" I said, "Well, I don't know what you call it, but we have had two weeks at it, and it would look as if there was a little cloud on it, and these fellows next to us seem to be juggling." He said, "Well, some friend of mine tells me that he thinks he can sell that"—I think it was for \$75,000—"and I am going to go ahead and make the payment." Mr. Doan and his son and I were all together. We walked down the street talking about it, and I said, "Well, if you want to go ahead and make it, we will sink or swim together, and if we lose out we will have to work all the harder, let her go." We stood in front of the bank a few minutes and talked it over, and finally he went in and made the \$30,000 payment.

I think Doan first went to Louisiana the latter part of April, 1919; he came back and reported making a deal on a well that we called the Giffen well; also, of a 40-acre tract that he had bought in Bull Bayou; that was a dandy. Mr. Giffen was in [101] trouble; he was representing some man from Los Angeles by the name of Graham, who had

(Testimony of B. T. Dyer.)

not sent the money to take care of the bills, and Giffen and Doan were old acquaintances, and Giffen put it up to Doan to take the transaction over and to pay the actual expenses and finish the well up. Doan told me about it. Then he bought the 40 acres, he told me, in Bull Bayou, and just a day or two after he had it he had been offered a nice profit. He said, we would sure make some money out of that. We discussed about selling it. I was generally pretty strong for selling. We talked about it, and he said: "No, Louis Titus is coming out shortly, and we had better wait until he gets there and see what he thinks about it." I said, "All right." It was not sold, he kept it.

Doan told me about when the Doan Oil Company was organized. After Titus had been there in company with Doan and Lucey, he came back to the Fort Worth Club, which was our headquarters and meeting place, and said, "We have arranged to make a \$300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece." The corporation was not organized until a little later than that. It was organized in June, 1919. I know considerable about the Martin Considine Syndicate. That deal was on in May or June, 1919. I had been out in the country and when I returned Doan told me he had gone in with Joe Terry and had put in a \$10,000 pool to pay for the option, \$2667, and for me to charge up our account with that amount on this option, that this bunch of fellows back of

(Testimony of B. T. Dyer.)

it were going to refinance it and put it into a syndicate where we would get this money back and would get as a bonus for putting up the \$2667, a stock bonus, which would not cost us anything. He told me to put that in my memorandum book, which I did. About three or four weeks later he told me that they had paid him back out [102] of their sales this money and to credit that up, which I did. That was one of Doan's deals, and I was not very active in it. The bonus stock was agreed to be pooled, as I remember it, up until this summer, I believe it was June, and Doan put that in his name, which was all right. Doan told me that when the deal was finally made that we were to get 20,000 shares of stock that was our personal property 50-50. As to the Oklahoma lease, after we had that a while, I think it was after the first place was sold off, Doan told me he thought it would be best to put that in with the Doan Oil Company, that he had talked with Titus about it, and I said, "All right, all in the same pocket, it is all right with me." He afterwards told me that he was going to put the Lamb five-acre tract in the Doan Oil Company too. That dropped in value shortly afterwards, and it didn't look very good. He said that Titus said that that and all these pieces should be put into the Doan Oil Company, even though that was a loss, to which I was perfectly agreeable.

I sold some leases for Jergins and got a commission in March, 1919. I sold some leases in

(Testimony of B. T. Dyer.)

Archer County, Texas, for the people in the Bank there and got a commission on that. I have never received the one-sixth interest in the Doan Oil Company. I demanded it many times; the final demand was in March, 1920, when I went to Shreveport. I went to Shreveport, as Larry had promised to fix this up many times before and had not done it; I went down and told him that I thought we had better fix it up. He just reared up and told me that he decided I had no interest with him. I was very much amazed, I could not believe it. I asked him what was the matter with him? He said I had not kept my contract with him and had not made a success of the North Texas Supply Company. I said: "Why, Larry, look at your statements, you know I have made a success of the North Texas Supply Company;" and he called me a damned liar, and I grabbed a water bottle and was going to crack him on the head and— [103]

Q. Well, never mind that. Has there been any settlement between Mr. Doan and yourself?

A. No, sir.

Cross-examination.

As to exactly what conversation took place between Doan and myself with reference to any partnership, there were a great many conversations. I cannot remember back two years and give you word for word all the conversations. It was one continuous conversation. That was our chief topic in the morning in the office; then we would go to lunch together and frame and talk and everything

(Testimony of B. T. Dyer.)

else. It is pretty hard to recall it word for word. On my direct examination I gave the sum and substance of all conversations relating to a partnership arrangement and I don't recall any other conversations or any other arrangements I have ever had with Doan with reference to any partnership. What I said upon direct examination is all the arrangements that I ever had or ever made with Doan at any time with reference to a partnership between us. I did not have any other arrangement or understanding with Doan except as I have testified. When I made my first trip to Texas in July, 1918, I went on my own account and at my own expense. I never asked Doan to refund any portion of the expenses I incurred on that trip. The conversations between Doan and myself in August upon my return were in our private offices in the Balboa Building. The sum of all that was said by Doan at that time in response to my suggestion that we go to Texas was that I stated to Doan after I advised him what investigations I had made, "I am going back anyway, Larry, and I want you to come back with me," and Doan's reply was, "I will come back with you and follow you up and hit the ball and back you up, and we will divide the profits." That was the sum of our many [104] conversations. I was a few weeks in Texas before Doan went down there. I had a deal in Bosque County, in Stevens County, in Eastland County, and in the Burke-Burnett County, also in Tillman County. As to the Bosque

(Testimony of B. T. Dyer.)

County deal, that was sold. I told Doan I thought we would not lose any money on it. Doan paid the money and the land was taken in Doan's name at my suggestion. My name did not appear in that transaction at all. We did not carry that land in the name of Doan and Dyer, or Dyer and Doan, and we never had any acccount in the name of Doan and Dyer, or Dyer and Doan. Only some of the bills around town, the garage bills, were called Dyer and Doan or Doan and Dyer. We never had any bank account nor common funds. We never had any common books of account. I kept a little memorandum and we used to sit down once in a while and balance up what we had done. I have not got that memorandum book here. We never used any stationery upon which both the names of Doan and Dyer appeared. I had a power of attorney from Doan which was given to me shortly after the Bosque leases were issued. Those leases were sold in the name of Doan by virtue of that power of attorney. I was acting as his attorney-in-fact. As to the Eastland leases, we had no joint account with reference to that transaction. They were taken in my name and I made the first payment on them. I put up \$500 good faith money. That was my money. Doan advanced, I think, about \$15,100. My \$500 was returned to me; after they were sold and cleared up that was deducted. The Tillman County purchase was taken in the name of Tom Owens. All I advanced was some lawyers' fees. I have not recovered them. The

(Testimony of B. T. Dyer.)

\$10,000 payment on the Burke-Burnett five-acre tract was Doan's money. I gave my check for it. I did not have \$10,000 in the bank at that time and Doan told me to draw the check and he would go in and deposit a check to my account to cover it. It was Doan's money and virtually Doan's [105] check, and Doan paid the balance of that \$40,000. Doan's son was present when I advised Doan not to make a second payment on that property. That was made two weeks later. In my judgment there was a question, there was a cloud as to the value of that property; we could not just learn what that adjoining well was; whether they were trying to cover something up or whether they had water. At the time the \$30,000 became due on that five-acre piece I advised Doan not to make the payment, and in the presence of his son and himself, I said: "All right, we will sink or swim together," and also, I would bear half the loss. I considered I had a half interest in that \$40,000 with Doan. I do not recall that Doan ever told me that I had a half interest in it.

Doan went to Louisiana and purchased forty acres in the Bull Bayou District and subsequently told me he had made that purchase. I had nothing to do with that transaction. I knew nothing of it except what Doan told me at that time. Upon his return from Louisiana he advised me that he had made that purchase and we discussed selling it. I don't think anybody else was present. That was shortly after he bought it, I think about the first

(Testimony of B. T. Dyer.)

part of May. I am positive that within two or say five days after Doan made the purchase of the 40-acre Bull Bayou piece, we discussed in the Fort Worth Club the question of selling that property, and I think it was early in May. I know Doan purchased another 80 acres northeast of the 40 and about 2500 acres of "wildcat" about three miles northeast of the 80. Doan told me of those purchases. What Doan told me about the Louisiana property is practically all I know. I was there a couple of days and went out to the 40 and the 80-acre leases with him and went over it. As to anything I did with the purchase or acquirement of any property, leases, or land in Louisiana, I made one sale of a piece [106] down there near Bull Bayou in November, 1919. I made it for Doan and myself. Some man had a lease and I was instrumental in selling it and Doan's geologist sent me \$530 and when I came out to San Francisco I gave Doan half in cash at the Palace Hotel. That was in November last year. As to what I did with reference to the Considine Martin Oil Company, I did not have a great deal to do, except Doan wrote me to give all the help I could, so when I came to San Francisco a good many spoke to me about it and I talked with a good many about it and did give him a little help, but I was not very instrumental in that deal. That was one he was looking after. I did not personally put any money into that deal, any out of my own account. Doan told me he put money in that deal;

(Testimony of B. T. Dyer.)

we never had a joint account, only an operating account. By operating account, I mean that we would make a deal like that; he would tell me what he had done in this case; he told me he had given Carey \$2760 and to make a note in my memorandum; that we would get it back shortly. No profits which we made in any joint venture were put into any joint account. As to the deal I had that Leland testified I had with him, his testimony was correct with reference to that. I talked to Doan about that deal and he said he did not want to go into anything that Leland was in, and Leland was just temporarily a little short and wanted me to loan him a couple of thousand dollars, which I did. I told Doan all about it at that time. I did not have any deal with Leland, I just loaned him the money. I did not make a profit in that venture. I did not get my money back. Later on, he told me he would like to have me keep that as it might turn out good. I told him I would keep it, it did not make any difference to me, it was a fair chance, and I turned around and sold half of it to a friend of mine for just what it [107] cost me.

Q. Then you did make that deal with Leland such as you have outlined?

A. That came up later, many months afterwards. Leland very often would speak to me about going in on something and I would speak to Doan about it, and Doan did not want to so I told Leland I could not go in, I was in with Doan, and when this par-

(Testimony of B. T. Dyer.)

ticular deal came up, he needed a little money and borrowed \$2,000 from me. I advised Doan at the time and talked with him about it; I never kept a thing from him, had nothing but what was in common, and I loaned Leland this money, and later on he was going to let a contract, I believe, and said if it was agreeable I might keep that interest, or he would pay it back, either one; I did not want to keep it, and I told Doan about it, that I was going to keep \$1000 in it, and I let in a man named Delaney for \$1000, and I just let it go that way. I really did not want the interest. I kept the interest as my own. I never had an independent venture in any way except with Doan. I accepted employment from the American Oil Engineering Company. I did not accept anything from them until I discussed the matter with Doan. My employment started with them some time this year, along about February or March of this year, regular employment. They gave me a retainer fee starting last fall, I think in November or December; that was simply to hold me and give them what little help I could give them. As to any arrangements in September, 1919, I think they called me back there, I don't remember the month, and I would not make any arrangements with them until I talked the matter over with Doan. I positively did not make an arrangement with them in September to enter their employ. I do not think I made any arrangement with them at all that early. My [108] regular arrangements were made this year. As to

(Testimony of B. T. Dyer.)

when I made any definite arrangements with the American Oil Engineering Company to perform any work or discharge any services for them, it might have been the last part of September or October that I talked with them. I decided to make arrangements with them along after the first of the year, but they sent me a monthly retainer check; I believe it was last November I first got my monthly retainer check; it might have been in October, but I think it was in November. That first retainer check was \$1000 a month. For that \$1000 a month I was to give them such time as I could without interfering with anything else. If they had any lead or contemplated getting a lease, or something, they would send word to me and I would make a report for them. I did not do very much for them until this year. The first agreement I ever made with them, I told them that I could not make any agreement. The first agreement I made with them which resulted in their paying me a thousand dollars would be after the first of this year, 1920. After October or November they paid me \$1000 each month and after the first of the year they started to pay me \$1250 a month. I have used the money in expenses and for my own purposes. I never invested any money in Louisiana in any property in which Doan was interested, except through Doan. I never invested one cent individually in any of these projects of Doan's. I don't know how much money Doan invested in Louisiana,

(Testimony of B. T. Dyer.)

except that he told me that he had put in \$100,000. I don't know how much he invested in Texas.

Redirect Examination.

I gave Doan my power of attorney. I had a conversation with Doan about reimbursing money he advanced for me in Louisiana. That was several conversations, most of them in the Fort Worth [109] Club in 1919 and 1920. I told Doan I wanted to know how far they were going to go on their idea, that I could get my \$50,000 for my interest, but I could not keep pace with Mr. Titus if he went too strong, and Mr. Doan told me that was all satisfactory, that the property was in good shape, and they were going to revamp or reorganize in a short time a new company, and the idea was really we would get all our money back with a little profit, and still retain a controlling interest in it, and he preferred not to have me get this money, in fact he was afraid I would have to put it up as collateral on the interest, and he did not want to let the voting power, half of it, get out of his hands, and he would carry it until we were dead safe. Doan asked me whether I could get the money. I told him of two places that I could get it. I told him Mr. Fleishhacker had agreed to let me have the money, and he told me that he preferred I would not get it from Mr. Fleishhacker, that he did not want him to share in the profit. I showed him a letter of the American Oil Engineering Company, and he told me when I needed this money to advise them and they would be able to get it for me.

(Testimony of B. T. Dyer.)

Q. Now, do you remember about what date that conversation was?

A. I started in from the first day that he told me that they had made this \$300,000 pool, and insisted many times that he had better let me put this in, and he always gave me that same answer. Just hold off, we were going to reorganize in a short time, and make a big company of this, and we will get this money back; I insisted many times that he let me put up my half, and was always met with the same answer.

I conversed with Doan with reference to the American Oil Engineering Company. My first talk with anybody in connection [110] with that company was a telegram from Mr. Wynn Meredith, whose office is in San Francisco with Sanderson & Porter. I got that telegram last fall. It went through Doan's hands. I was in either Pittsburgh or Chattanooga when I got that telegram repeated. Doan opened it and retelegraphed it to me. In pursuance to that telegram I saw Meredith in New York where I went from Pittsburgh, and I told Meredith that I was associated with Doan and looking after the North Texas Supply Company, and it would be impossible for me to make any arrangement with them; however, they were a fine crowd of men, and lots of money back of them, and while it was a pretty nice thing that we could be associated with moneyed men that way, I could see the virtue of it, I could not absolutely make any arrangements about it, I could receive nothing from

(Testimony of B. T. Dyer.)

them until I talked to Mr. Doan. I told them that I would be very glad to make any report or do anything that I could for them absolutely out of courtesy to Wynn Meredith with no pay. I talked to Doan about it afterwards and related that conversation. Doan said it might be a good channel into big money, and it would be a good thing to keep in with them that way, perfectly satisfactory. I said, "Is this all right, you are getting your salary from the Doan Oil Company, I will get this salary," and he said, "All right, go ahead, that is perfectly satisfactory to me, and it puts us in touch with money, with good, big money, the gateway into the money at New York. I told him at that time I talked with them about his property, that he told me of some offer for three quarters of a million dollars for a couple of pieces he had; they knew, in a way, about those leases, and I told them about the project; they told me that I could negotiate with him for the purchase of those at \$800,000, and I made him the offer and told him all about it, and he said, "No, it is worth a lot more than that." [111] He would not think of it. So I advised them I had done that.

As to any conversation with Doan about his carrying my interest in the Doan Oil Company for a percentage, I don't remember of holding such conversation with him on that particular point. I talked with him so many times about it, but I don't remember of a conversation on that point of whether he would carry me for any particular interest. I

(Testimony of B. T. Dyer.)

told him I would have to give Fleishhacker a quarter of it if I got the money from him. Doan said he did not want them to share one bit of it. Doan wrote me a letter dated October 12, in the year 1919, I think.

The letter introduced is Plaintiff's Exhibit No. 7.

Plaintiff's Exhibit No. 7.

(Letterhead of DOAN OIL COMPANY, INC.)

"Shreveport, La. Oct 12.

My dear Tom—

I will try and get up to Fort Worth sometime next week—So you had better write me fully what you have in mind and if there is anything I can do will take it up with you when I go to Fort Worth—I have a lot to do this week—We are working on a couple of blocks of acreage—which I will have to stay with or loose out—Don't know yet whether I will get them or not—There is absolutely nothing you could do over here—the roads are all closed on account of rain and no chance to get out—While there is a big boom on here I have not seen anything that I could recommend to your crowd—That we cannot handle ourselves—and as I said before I cannot afford to mix up with you on any outside deals in Louisiana—I don't want to be criticized by Titus and Cap Lucey—So I think it the better policy for you to confine your operations to Texas & Oklahoma for the present—If I should start something else here—it [112] would result in hard feelings and I want to avoid that if I can.

(Testimony of B. T. Dyer.)

So far as selling our properties are concerned—Titus is opposed to it and I don't want you to lead anyone to think they are for sale—When the proper time comes—and we decide to sell will let you know—I have written Titus and told him my views on the proposition but have not heard from him—

Howard came here this morning. I don't know what he is here for, but will find out during the day—

Our big well is fast dropping down and will be completely cut soon—I think perhaps it is sanded—It never had a strong gas pressure—We are putting up a standard rig which will be completed during this week—We will then be able to pull the drill stem and clear out the hole—We will do everything possible to get production back—but I am inclined to believe will have to put it on the pump. It will, sure make a good pumper—300 or 400 brls—for a long time—But I hope we can make it flow again—

No. 2 well had a fishing job for a week—and now is drilling again. Should be completed before the 15th of November—we are drilling on Number one on the 80 in Section Six and will be drilling on No. 2 within a few days—We will get better wells on this property and they will stay longer—I expect from 2500 to 5000 brls on each of these wells and No. 1 will be completed by the 15th of November—No. 2 by the 1st of December.

I am afraid however that, we will be up against—over production—The pipe lines are already crowded—So we will probably have to pinch our

(Testimony of B. T. Dyer.)

wells in. We will have a big production but we may not be able to handle it—We will do the best we can however and make every provision possible to take care of it.— [113]

No. 2 well on the Giffen lease is producing—It is a better well than No. 1. We will probably have 60 brls a day from the two wells—

Now in regard to yourself—It seems to me that you should be able to get something for your California crowd and get it started before they get cold feet—or change their mind. And so long as you are located in Texas with the North Texas Supply Co. on your hands—you cannot very well start something which will take you away from there—I don't want to kick or be a grouch—but you cannot expect to make any money if you make a trip to California every 60 days. In the first place, it costs you too much money,—when you cannot afford it—and secondly—You are needed in Texas—If you get down to brass tacks—and put your head to work you will make a killing—There are plenty of good opportunities—just as good there as here—Just forget about this thing over here—I think I am capable of handling it and there is no room at present for two of us—

There is nothing in this hurrah business—there is a golden opportunity for all of us—The North Texas Supply Co. alone is a big thing and can be made a bigger one—You should take out your stock even if you have to borrow the money.—In a year or two—with 20,000 shares of stock it will

(Testimony of B. T. Dyer.)

make a hundred thousand dollars—I don't know where you can do any better on a \$5000.00 investment—Cap Lucey wants you to take it—and although there was a misunderstanding about it—I don't feel that you should hesitate—if you can get an oil Co. started along with your North Texas Supply Co.—you will have your hands full—

I don't want you to have any feeling about this—because I am the best friend you ever had—and if a friend cannot speak his mind—who can— [114]

No one can criticize your ability or integrity—I have demonstrated my faith in you—but you must quit rainbow chasing and traveling so much and get down to brass tacks— have no fault to find—with your trip to Houston and anything in the interest of your business is fine—But do not go away and leave unfinished opportunities.

This is all have to say—and want you to take it in the spirit in which I have said it—

Everything will come out fine if we all keep our nose to the grindstone for another year—We cannot spend our money before we make it.

Let me know fully what you have in mind by letter and there is anything to be done—when I can co-operate I will be glad to do it.

Soon as Emery can get away for two or three days—would like him to come over—He has never been over here—and a few days off will not hurt.

Sincerely Yours,

LARRY."

(Testimony of B. T. Dyer.)

As to the following expression in that letter, "Just forget about this thing over here. I think I am capable of handling it and there is no room at present for two of us." Doan always told me that he could handle them alone; we would divide our efforts and I would run the Texas end and he would run the Louisiana end. Doan told me to just go steady and not get into anything that we would lose in and keep in the middle of the road and we would make a million dollars at least. The Giffen No. 2 well referred to in that letter is the same Giffen lease that I spoke of as having acquired in April, 1919.

I received a letter from Doan from Houston, dated June [115] 23d.

Letter introduced as Plaintiff's Exhibit No. 8.

Plaintiff's Exhibit No. 8.

"Houston, Texas, June 23.

My dear Dyer—

I do not think you will have any further reason to complain about shipments. You will have first preference—Of course you will have to get your orders in—so they will have precedence—Carr received your order this morning for 6 rigs—Says you had better make up an order for 6 more—and keep on sending them in so that when they get to rolling you will have rigs coming all the time—and of course you will have to order your other material the same way.

Carr agrees with you that you should carry no

(Testimony of B. T. Dyer.)

dead stock—and that you should keep away from the small stuff as much as possible—except extras which I don't know anything about—

I have arranged with the Captain—so you will have the Capital Stock (50%) all paid in within the next 10 days—Pittsburgh will send you \$5000.00 Chattanooga 5000, Houston 5000 and New York the balance. Cap says they will carry you for \$10,000.00 to be turned over when the store has earned \$100,000.00. He would like you, however, to subscribe for 10,000 additional—and if you can borrow the money I would advise you to do it. I will pay mine whenever you require it—When the 50% is paid in you will be able to make a statement to banks, which will give you borrowing capacity.

Cap is very enthusiastic about your company and has given positive orders to take care of your wants.

The New Tulsa Company will only handle Standard tools—so they will not compete with you at all. Make it a point to get your orders in ahead of time—So that Houston office [116] will have no excuse.

Captain fully agrees with us that the contracting end of the business is the best end of it and wants you to go as far as you like. Of course you will have to be very careful about the men you are backing.

I will go to Wichita Falls soon as Titus and Cap leave Shreveport.

Sincerely Yours,

DOAN."

(Testimony of B. T. Dyer.)

I also received a letter from Doan dated August 7, 1919.

Letter introduced as Plaintiff's Exhibit No. 9.

Plaintiff's Exhibit No. 9.

(Letterhead of DOAN OIL COMPANY, INC.)

"Shreveport, La. August 7th, 1919.

Mr. B. T. Dyer,
Ft. Worth, Club,
Ft. Worth, Texas.

My Dear Tom—

Enclosed herewith find original appendment of Kay-Akin on the abstract of five acres in Burkburnett.

If the New York deal does not come through in a day or two I think we shall insist on Sims making a payment. If he wants additional time on the balance, we can very well afford to string it along for a little, but we should insist on a cash payment of at least half. Wire me upon receipt of this just how the matter stands.

Yours very truly,

L. E. DOAN.

LED/K, Enclosure."

The five acres referred to in that letter applies to the Lamb piece. The Mr. Sims mentioned in that letter was going to buy the Lamb tract, but didn't.
[117]

The following letter was then introduced in evidence and marked Plaintiff's Exhibit No. 10.

(Testimony of B. T. Dyer.)

Plaintiff's Exhibit No. 10.

(Letterhead of B. T. DYER.)

“San Francisco, Feby 17, 1919.

My dear Tom—

I rang up Mr. Paul Shoup this morning and he informed me that he had answered your wire from Los Angeles—

I had a long talk with A. J. Pollok this morning. He is leaving next Friday for Houston, Texas, on account of the oil bill having passed he will soon have a barrel of money—He is going to look for something—I told him to call on Carr and to look you up which he said he would do—If you have anything good lined up it will be a good idea for you to see him and it would not be a bad idea for you to go to Houston about the time he arrives—He wants something close in—but can handle anything. They have over \$1,000,000.00 which will be released within a few days and in addition he has Pat Welch back of him—So there is no doubt about his financial ability.

I have a date with Mr. King tomorrow of the Boston Pacific—They will also have about \$1,000,000.00 released in this settlement. He is anxious to get into Texas. I may be able to handle him—Will try—

Otherwise there is nothing new—Except that I expect to get everything cleared up this week so I can be on my way.

Sincerely yours,

DOAN.”

(Testimony of B. T. Dyer.)

Recross-examination.

I do not recall who was present at any of the conversations [118] to which I have referred on direct examination which I had with Doan. In our private affairs we were generally alone in the Club. My recollection is that, generally speaking, there was no other person present at these conversations relating to our private affairs.

Redirect Examination.

Letters and telegrams were then introduced by plaintiff without objection by defendant and marked Plaintiff's Exhibits 11 to 34, inclusive, and are as follows:

Plaintiff's Exhibit No. 11.

(Letterhead of DOAN OIL COMPANY, INC.)

"August 29th, 1919.

Mr. B. T. Dyer,
c/o North Texas Supply Company,
Wichita Falls, Texas.

My dear Tom:—

I duly received your letter of Thursday and wired you this morning that under the circumstances that I did not think you should expect check for your expense account. We will need all the money here that we have, and if you are in need of funds you can very easily arrange with the bank to get it.

Mr. McDevitt arrived this morning from Wichita, and he is going to locate here. I have already got him busy on several propositions. He says that

(Testimony of B. T. Dyer.)

the well on the island northwest of Burkburnett came in yesterday. Also said that another well twenty miles northwest in Tillman County came in, reported about five hundred barrels, and as you say Mr. Testerman's well is also in the sand it now looks like a sure proposition and that the oil will go across the river, and McDevitt says that our acreage in [119] section thirty is right in line, and that we should be in no hurry to sell. He also says the well being drilled in section twenty-eight, undoubtedly, lays to far north, and that it is now generally conceded that the general anticline lays farther south and directly through section thirty. I think under the circumstances we had better withdraw our forty acres from the market for the present. Please advise Mr. Couch.

In regard to Sims' deal you do not state in your letter that you have seen him at all. It looks to me like we have gone about as far with Mr. Sims as we can without having a show down, and I hope you will follow the matter up, and bring it to a head either one way or the other, and let me know as soon as possible because if he is not coming through I will have to make arrangements for more money elsewhere.

Mr. McDevitt says there are a number of wells in section seventy-four, also seventy-five, which have been drilled in two thousand feet. All of them big producers. If this is absolutely true, our piece in seventy-five may be all right. If there is any way on earth for you to find out, and get the true

(Testimony of B. T. Dyer.)

facts in regard to the depth of these wells, I wish you would do it, otherwise, I will have to make a trip there for that purpose.

Mr. Sims has made so many promises and broken them that I have no confidence whatever in what he says, and I would have no hesitancy in pinning him down.

Regarding the Testerman Lease, McDevitt informs me that suits were filed against him yesterday, and that there is no chance on earth to clear the titles on that land for the present. I am telling you this for your information. I realize that Mr. Testerman may be in a better position to know about the titles than McDevitt, at the same time I would advise you to be very [120] careful about putting any money into a lease where there is any doubt whatever about the title.

I am glad to hear that everything is going along alright, and I hope you will close the deal with Mr. Sperry for Tubbs cordage.

Our well at Bull Bayou is two thousand seventy-five feet deep this morning. They have had a lot of trouble on account of gas blowouts, but they expect to land the six inch pipe within the next four or five days. It will then take about two weeks to complete the well.

I expected to go to Wichita today, but will be unable to get away this week. When is McLain going to leave for California? I would like to put in half a day with him before he goes. However, if

(Testimony of B. T. Dyer.)

he is coming back within a couple of weeks, I can wait until he returns.

From present indications there will be a big boom in this country this fall, and I am very anxious to get as much development done as possible, because we might have an opportunity to sell some production at a big price.

Mr. Delaney spent a couple of days here, left last night for Fort Worth. He is a very fine fellow, and seems to be very much pleased with this country. He expects to return here shortly. Please follow up Sims, and let me know as soon as possible, whether the deal is off or not.

Sincerely,

L. E. DOAN.

Plaintiff's Exhibit No. 12.

Houston, Texas, Sept. 13.

My dear Tom—

Carr met me this morning at the train—We had [121] breakfast together—and had a real row—He started by saying he thought Emery should run the finance of your company and not McL. Said he wanted trade acceptance which Mc had refused—&c. Immediately got hot and told him he alone was to blame—that if he would complete your orders—so you could get your money that there would be no trouble about trade acceptances. We had it hot and heavy for a while—I told him that he had not treated Worth Texas right. That he had sold goods there and a lot of stuff—all of

(Testimony of B. T. Dyer.)

which he denied—I told him I was going to the bat on the proposition. We had a real interesting time—I also told him—Everybody was sore at the Lucey Co.—and that he alone would be blamed for it—After a while he cooled down and parted good friends—But he knows that he will have a fight when it comes to justifying many things—I thought at first that I would take it up with Captain—but concluded it would only make a row—So all I said to Captain was that I had a spirited talk with Carr—that you had been complaining that I had told Carr what I thought of it—I think you will receive a little better service—Captain is much pleased with your showing. Says it is better than he expected. Do not ever let on that you know anything about the row—I am sure that I have set Carr to thinking—and that he will not make any promises in the future that he cannot fill.

I am returning to-night to Shreveport—Captain goes to Chattanooga—Says he has the strike beaten and the shop is now 75 per cent efficient and will be 100 per cent in another 10 days.

2—5000 brl wells came in at Bull Bayou near our 80—one on the Gulf property and one on the Strange—just $\frac{1}{2}$ mile south of our 80. [122]

Remember me to Mrs. Dyer.

As ever,

LARRY.

Plaintiff's Exhibit No. 13.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., Sept. 13th, 1919.

Dear Tom—

I had a big time with Carr over the trade acceptance—I told him that the reason you refused them was because of unfinished orders—That you could not sell the goods or get the money for them until he had completed your orders—And if I were in your place in future—I would absolutely refuse to give acceptances for any more than you actually owe for completed orders—Of course you may later have to borrow at the bank but you are perfectly safe, so long as you keep your outstanding accounts in good shape—I think you should refuse all credit except where you absolutely know parties will pay at the end of the month. Play safe.

I finally had an understanding with Carr—I told him he had been shipping goods to Wichita contrary to our agreement and that we absolutely refused to stand for it any longer—He denied of course that he had done so—I told him I was ready to go to the bat and take it up with the Captain—he begged me not to do so—and I did not—but I told Cap that I had jumped on Carr pretty hard—but I did not give any details.

Carr finally agreed to turn over some orders which he said were given before you started—he also said it would be alright for you to sell rigs anywhere—and that you could send Jimmie down here if you like—So you had better reconsider

[123] cancelling any of your orders—you can sell anything on order here—if you cannot up there—I think I have got Carr Buffaloed—I sure went after him strong—and he knows I mean it—Do not ever let on that I mentioned it.

You cannot tell the balance of subscriptions in without a meeting of the Board—and I do not think it advisable to do that—You are taking no chances if you have to borrow—but you will have to watch your stock and outstanding accounts so you will be able to meet your obligations.

If you cannot get a contract in Burke—you can get them here. However I would send your man over first—and let him close before you ship the rig—My second rig will be here by the 1st of October, and I will have two of our own going—a little later I could probably use your rig—But you will have no trouble in getting a contract—The only trouble you will have will be in getting casing.

I expect our No. 1 well in Bull Bayou will be in by the end of this week—Will let you know—I wrote you about two 5000 brl wells near our 80—Things look pretty good up there.

Cap. Lucy spoke about your stock—He says he will give you the 1000 shares—but thinks you should subscribe for 1000 more—You can easily borrow the money on the stock—and I think you had better do it—It will look better—and you are taking no chances.

LARRY.

Now that the Worth Texas is to ship the two rigs here—You had better be there and see that

everything goes out properly billed—and see that sight draft goes along with invoice—So that the rigs will have to be paid for before released by the Railroad.

DOAN. [124]

I will see if anything can be picked up in Homer. Haven't had much time to look into things up there—but will try and find something. Giffen made a sale yesterday—\$1250 commissions—of which Doan Oil Co. gets half. I will get his salary all back pretty soon.

Plaintiff's Exhibit No. 14.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., September 15th, 1919.

Mr. B. T. Dyer,

c/o Ft. Worth Club,

Ft. Worth, Texas.

My dear Tom:—

Please find out as soon as you can when you can deliver any more rotary outfits. You had better take it up with Carr at once and find out just how many you can depend on within the next thirty days, and what you cannot handle at Wichita Falls I can sell here and get you a five per cent bonus on all of them.

Mr. Ray, our field foreman, has just received some information from a driller friend of his, who is drilling a wildcat well ten or fifteen miles southwest of Homer. It looks very much like they will bring in a well. I am going to make a further investigation and if I can verify it will let you know.

It might be a good opportunity for your California bunch and I will probably take some for the Doan Oil Company.

Our well in Bull Bayou is held up for a day or two. The contractors have shipped a new drill stem to use in finishing the well and they are unable to locate it. We are having just as much trouble here hunting freight as you are in Wichita. [125] I will let you know about when we expect to finish the well so you can come down and bring Mrs. Dyer with you.

With kindest personal regards to yourself and Mrs. Dyer, I remain,

Very truly yours,

L. E. DOAN.

LED/K.

Plaintiff's Exhibit No. 15.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., September 19th, 1919.

Mr. B. T. Dyer,
c/o Ft. Worth Club,
Ft. Worth, Texas.

My dear Tom:

I am enclosing herewith a clipping which would seem to indicate that there is a chance for a settlement in the river front properties at Burkburnett.

We have started drilling in #1 Pugh Well, and about Tuesday next it should be completed. I told you I would let you know so that you could come over if you cared to.

It will be absolutely impossible to get any decent

accommodations at the hotel here. The best you could probably do is a room without a bath. Even at that you would have to wire a couple of days ahead.

There is great excitement in the Homer Field. A report has just come in of a well four miles north of any production which is reported to have come in at about one thousand feet of depth.

The boys seem to be having some trouble in shipping the two rigs which I sold here. I hope you are not getting into the same habit as the rest of the Lucey Organization in making promises that you cannot fill. The parties here are very [126] anxious about the rigs. I wish you would see that they are shipped without further delay, if you have the material. If you have not got the material, please let me know so I can cancel the order.

Let me know if you are coming over the first of the week.

Sincerely,
DOAN.

LED/K. Enclosure.

(The clipping enclosed reads as follows:)

OKLAHOMA QUITTS?

Austin, Texas, Sept. 18.—Oklahoma has abandoned its claim to the oil land lying south of the center of Red River and is returning the money to those who had filed upon it under the Oklahoma Claim Act, according to unofficial, though reliable reports reaching here. The Federal government, however, it is understood, persists in the attitude

that the true boundary between Texas and Oklahoma is the south bank of the former bed of Red River.

Attorney General C. M. Cureton and Assistant General C. W. Taylor are now in Washington, D. C., and are not expected to return until early next week. They are in the national capital making an investigation of records there to establish the claim of Texas that the true boundary between this state and Oklahoma is in the center of the river bed.

There are forty-five sections of valuable oil land involved, valued at upward of \$5,000,000.

Plaintiff's Exhibit No. 16.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., October 14th, 1919. [127]

Mr. B. T. Dyer,

Fort Worth Club,

Fort Worth, Texas.

My dear Tom:—

I am in receipt of a letter from Captain Lucey in which he advises that the North Texas Supply Company immediately vote you ten thousand shares bonus stock of the North Texas Supply Company. Captain advises that you may use the ten thousand shares as collateral on which you can easily borrow five thousand dollars to take up your subscription for the ten thousand additional shares.

I have just received your wire of the 13th. Hope you will meet with success in getting your casing, but, no doubt, you will find it a difficult job unless some of the big companies will loan it to you. Possibly you can borrow it from Pyron.

Mr. Hoover and Rowland Doan will be here tomorrow. Do not know how long they will stay, but I will try to get over to Fort Worth at the end of the week.

It has been pouring rain here for the past ten days. It is impossible to get near any of the oil fields in automobile. The roads are worse than they have ever been at any time since I came here. Our well is holding its own, seems to be improving a little. Am quite sure that as soon as we can pull the drill pipe it will come back. In any event it will pump four or five hundred barrels for a long time. Our other oil wells are progressing rapidly, and should be completed by the middle of November.

Sincerely yours,

LARRY.

LED/K. [128]

Plaintiff's Exhibit No. 17.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La. November 7th, 1919.

Mr. B. T. Dyer,
Fort Worth Club,
Fort Worth, Texas.

My dear Tom:

I am in receipt of your letter in regard to income tax.

I am already familiar with the Twenty Percent Proposition, and have discussed the matter with Mr. Titus.

While in New York, Mr. Titus and I called on

Mr. Porter and told him that we had called on your suggestion. We went more with the idea of finding out what could be done than of any definite idea of making a sale. Mr. Porter was very nice to us. Said he would be very glad to assist us in any way possible, but that it was not the policy of his organization to buy properties. They make loans and pass on propositions for their clients. After talking to Mr. Porter and several other large brokers in New York, Mr. Titus and I concluded that we are not in any position to make any proposition at the present time. In fact, Mr. Titus is strongly of the opinion that we should not sell anything. I expect him here shortly, and will go into the matter further with him when he arrives.

I am also in receipt of your letter of November 3rd, enclosing copy of your letter to Mr. Hoover. As I am not familiar with all of the details of the different transactions, of course, it would not be proper for me to take it up with Mr. Carr or Captain Lucey. I think, however, that you should stand firm. Mr. Carr positively agreed with and assured me that you could cancel any order at any time, and if I were in your place I would [129] absolutely insist on him living up to his agreement.

I have just received some letters from Stockton, and mother is very sick, and I may be called to Stockton at any time. In the event of my going I would like to have Emery come down here and stay while I am gone if it is possible for him to get away.

I received your wire in regard to returning via Fort Worth to hold a Directors' Meeting, but I had some matters here that absolutely required my attention and could not come by way of Ft. Worth. I do not know why you cannot hold a Directors' Meeting without my being present. If you will write me just what you want to take up, I will write my approval. In the event that I do not go to Stockton, I will be able to go to Fort Worth some time next week.

We are getting along very well with our additional wells and expect to have them completed sometime between the fifteenth of November and the first of December. There is so much congestion, however, that I doubt very much if we can sell any of the oil. Pugh #1 Well is only producing about one hundred barrels. On account of the rains and inability to get work done the Standard Rig has not been completed but we expect to have it completed by to-morrow and will immediately pull out the drill pipe and see if we cannot get the well back on production again. I am inclined to think, however, that it will only be a pumper as the gas pressure in that end of the field seems to have declined in all the wells.

Sincerely,

DOAN. [130]

Plaintiff's Exhibit No. 18.

(Letterhead of DOAN OIL COMPANY, INC.)

Shreveport, La., January 8th, 1920.

Mr. B. T. Dyer,
Care Fort Worth Club,
Fort Worth, Texas.

Dear Tom:

Replying to yours of the 6th inst. I will make it a point to be in Fort Worth on January 19th to attend the trial of the automobile case.

I am closing up my books and am going to close up the business of the Santa Maria Well. In looking through the papers which were shipped to me from San Francisco in that typewriter case, I find that most of the vouchers, checkbook and a lot of papers relating to the Santa Maria Well were omitted. I think they were in the safe in our office, or my desk, in San Francisco. If you know where those papers and books are located, I wish you would wire them immediately to send me all of them by express so I can clean this matter up. About the only dividend that will be paid, will be paid to Captain Lucey and that will be small. I expect Emery here Sunday, and he will leave within a day or two for Wichita Falls. When I come to Fort Worth we will talk over all our affairs. In the meantime I wish you would rush those papers if you know where they are located.

As ever yours,

L. E. DOAN.

LED/K

Plaintiff's Exhibit No. 19.

(WESTERN UNION TELEGRAM)

1918 Jul 18 AM 2 16

W. Seattle Wash 17

B. T. Dyer,

1074 Balboa Bldg

San Francisco Calif. [131]

Leaving here Friday noon Arrive San Francisco Sunday morning Titus will not be there until August first Nothing doing about Texas until he arrives Has other proposition which he thinks better Do not go until I arrive Income matter looks better.

L. E. DOAN.

Plaintiff's Exhibit No. 20.

(WESTERN UNION TELEGRAM.)

1919 Jul 16 PM 1 50

Shreveport La 251P 16

B. T. Dyer

Care W L. Luland

Balda Bldg

San Francisco Calif

Carr would like you to meet us Houston Saturday or Sunday Answer.

L. E. DOAN.

Plaintiff's Exhibit No. 21.

(WESTERN UNION TELEGRAM.)

1919 Jul 19 AM 5 12

Shreveport Lu 18

B. T. Dyer

Palace Hotel

San Francisco Cal

Better see Associated about commission Kern
Front property Papers reports Standard have
brought in big well out there There is no reason
why Associated should not pay now.

L. E. DOAN.

Plaintiff's Exhibit No. 22.

(WESTERN UNION TELEGRAM.)

1919 Jul 30 AM 6 21

Shreveport La 29 [132]

B. T. Dyer

Care North Texas Supply Co

Wichita Falls Tex.

Received wire from Carr asking me to meet you
Hoover and him at Ft Worth Friday I have wired
cannot be there but asked him to bring you all
over here free envoy (Emery) Will send my
check North Texas Supply Co Foreman (for me).

L. E. DOAN.

Plaintiff's Exhibit No. 23.

(WESTERN UNION TELEGRAM.)

1919 Aug 15 PM 6 59
Shreveport La 232P 15

B. T. Dyer
Ft Worth Club
Ft Worth Tex

If Sims does not show tomorrow better wait until you see him and get positive settlement If he asks for more time insist on substantial payment now Wire soon as you have seen him.

L. E. DOAN.

Plaintiff's Exhibit No. 24.

(WESTERN UNION TELEGRAM.)

Shreveport La Sept 12 1919

B. T. Dyer
Ft Worth Club
Ft Worth Texas.

You get four per cent above regular Lucey prices to consumer They wanted to give me commission of four per cent I told them it would be added on invoice Stop I have signed order for two rigs draft to accompany bill of lading Emery will get order tomorrow Stop Going Houston tonight Cannot see Child Stop Better keep mum about sale of rims

L. E. DOAN.

955 P [133]

Plaintiff's Exhibit No. 25.

(WESTERN UNION TELEGRAM.)

1919 Sep 30 PM 1 26

Shreveport La 1132 A 30

B. T. Dyer

Cr J. F. Lucey Mfg Co

Pittsburg Pa

Houston advises that Jones and Laughlin Steel Company will ship five cars six inch pipe commencing latter part of October Stop Very important we get confirmation Please have Hoover use every endeavor to advance shipment as soon as possible and advise me Stop Well holding up good.

L. E. DOAN.

Plaintiff's Exhibit No. 26.

(POSTAL TELEGRAM.)

Pittsburgh Pa. Oct. L, 1919

Nite Letter

Western Union

Mr. L. E. Doan

North Texas Supply Co.

Wichita Falls Texas.

Barring unforeseen troubles Pittsburgh can likely ship your entire shipment pipe this month I advise notifying Pittsburgh best shipping instructions. You may possibly want some man ride through Stop Things very satisfactory here Am writing fully Best regards

B. T. DYER.

BTD:G

Chrg Lucey Mfg. Corp.

Plaintiff's Exhibit No. 27.

(WESTERN UNION TELEGRAM.)

W WASHN DC Nov 1 1919 1006A

B. T. Dyer

Ft Worth Club

Ft Worth Tex [134]

Going New York tomorrow with Titus Pennsylv-
vania Hotel Monday.

L. E. DOAN.

1009 A.

Plaintiff's Exhibit No. 28.

(WESTERN UNION TELEGRAM.)

1919 Nov 4 PM 2 31

PH New York NY 230 P 4

B. T. Dyer

Fort Worth Club

Ft Worth Tex

Leaving today arriving Shreveport Thursday
evening Stop Nothing doing here Will go Ft
Worth end of next week

L X E DOAN

Plaintiff's Exhibit No. 29.

(WESTERN UNION TELEGRAM.)

1919 Nov 8 PM 8 05.

Shreveport La 8

B. T. Dyer

Blackstone Hotel

Chicago Ill

Dunn in field with Raymond Number one doing

hundred barrels Will complete two wells about
December first Stop My mother very ill May
have to go California Stop Would like Every
to come here during my absence when you you
return Ft Worth.

L. E. DOAN.

Plaintiff's Exhibit No. 30.

(WESTERN UNION TELEGRAM.)

1919 Nov 11 PM 1 08

Shreveport La 10 via BH Chicago Ills 11

B. T. Dyer

Care Sanderson and Porter

41 William St

New York NY

My mothers condition very serious I have wired
Emery to arrive here Thursday morning Stop
Titus and Lucey here We have made no plans
except to go along as usual

L. E. DOAN. [135]

Plaintiff's Exhibit No. 31.

(WESTERN UNION TELEGRAM.)

Stockton Calif 1226 P Nov 25 1919

B. T. Dyer

Vannuys Hotel

Los Angeles Calif

Cannot say whether can be San Francisco Friday
or Saturday Mothers condition requires me here
Write or wire what you have in mind.

L E DOAN 129 P.

Plaintiff's Exhibit No. 32.

(WESTERN UNION TELEGRAM.)

1919 Nov 27 PM 1 37

PA San Francisco Calif 124P 27

B. T. Dyer

Van Nuys Hotel

Los Angeles Calif

I will be at Palace until noon tomorrow

L. E. DOAN.

Plaintiff's Exhibit No. 33.

(WESTERN UNION TELEGRAM.)

Shreveport La 1218 P Dec 19 1919.

B. T. Dyer

Penn Hotel New York

Have obligations to meet January first can you
send me six thousand dollars advanced by me your
account Santa Maria well Answer

L E DOAN 250 P

Plaintiff's Exhibit No. 34.

(WESTERN UNION TELEGRAM.)

1920, Feb 7 AM 1 36

Shreveport La Feb 6

B. T. Dyer

Ft Worth Club

Ft Worth Tex

Our Nelson two came in Tuesday night with
enormous pressure [136] and caught fire from
electric wires We extinguished fire tonight and

saved well It is a big producer I dont know how large.

L. E. DOAN.

The property sold to Couch was purchased from Cockrell. The two checks shown me are for payment on a lease I was purchasing from Cockrell, who was the land owner in Stevens County, Texas, and is the same transaction I spoke of yesterday. The net profit in that transaction was \$7,000. No other actual money was put up except those two checks.

Checks introduced in evidence and are as follows:

Plaintiff's Exhibit No. 35.

(CHECK.)

Fort Worth Texas, Mar. 1, 1919. No. 6.

**THE FIRST NATIONAL BANK OF FORT
WORTH**

Pay to W. G. COCKERELL or order, \$1000.00,
One Thousand and no/100 Dollars.

B. T. DYER.

(Endorsed: "W. G. Cockerell." Pay to the order of Any Bank or Banker or Trust Co. 88-966. Mar. 1, 1919. 836. Previous Endorsements guaranteed. First National Bank, Breckenridge, Texas.")

Plaintiff's Exhibit No. 36.

CHECK.

Fort Worth, Texas, Feb. 22, 1919. No. 3.

**THE FIRST NATIONAL BANK 37-1 OF
FORT WORTH.**

Pay to W. G. COCKERELL or order, \$250.00,
Two Hundred Fifty and no/100 Dollars.

B. T. DYER.

(Endorsed: "W. G. Cockerell." Pay to the order of Any Bank or Banker or Trust Co. 88-966. Mar. 4, 1919. 836. Previous Endorsements guaranteed. First National Bank, Breckenridge, Texas.") [137]

Another check, dated March 4, 1919, was the first check paid on the 240 acres in Eastland County, purchased from Olcott, who had the lease. That was the contract introduced yesterday.

Check introduced and marked Plaintiff's Exhibit No. 37.

Plaintiff's Exhibit No. 37.

CHECK.

Fort Worth, Texas, Mar. 14, 1919. No. 15.

**THE FIRST NATIONAL BANK 37-1 OF
FORT WORTH.**

Pay to Mestre Olcott or order, \$500.00, Five Hundred and no/100 Dollars.

B. T. DYER.

(No endorsement, but stamped "PAID 3/14/19.")

A check dated June 6, 1919, was for lawyer's fee for examining title and drawing contract on the Lamb tract.

Check introduced in evidence and marked Plaintiff's Exhibit 38.

Plaintiff's Exhibit No. 38.

(CHECK.)

Fort Worth, Texas, June 6, 1919. No. 61.

THE FIRST NATIONAL BANK 37-1 OF
FORT WORTH.

Pay to JOHN C. KAY or order, \$65.00, Sixty-five and no/100 Dollars.

B. T. DYER.

(Endorsed: "John C. Kay." "88. Pay to the order of Any Bank, Banker or Trust Co. 130 Jun. 14, 1919. City National Bank, Wichita Falls, Texas." "Received payment through clearing house Jun. 16, 1919. 5. Fort Worth National Bank, Fort Worth, Texas.")

That was the same Lamb tract that was afterwards turned in to the Doan Oil Company, the same as the Oklahoma tract. [138]

A check dated March 23, 1919, was in payment of attorney's fee, approving title of the Olcott tract, 240 acres in Eastland County.

Check introduced as Plaintiff's Exhibit No. 39.

Plaintiff's Exhibit No. 39.

(CHECK.)

Fort Worth, Texas, Mar. 23, 1919. No. 22.

THE FIRST NATIONAL BANK 37-1 OF FORT
WORTH.

Pay to M. Cleberg or order \$100.00, One hundred
and no/100 DOLLARS.

B. T. DYER.

(Endorsed: "M. Kleberg." "Received Payment
Through Clearing House. Mar. 25, 1919. 5. Fort
Worth National Bank, Fort Worth, Texas.")

This paper which is handed me is in my hand-writing. Doan told me that he had talked the matter over with Titus and that we had spent a good deal of our time in connection with these properties and Titus wanted us to put our bill of expense in to the Doan Oil Company, as he was opening up the Doan Oil Company's books, and, also, it had been agreed that we would each charge half of the automobile we owned. He wanted this sent in immediately so that they could get them into the Doan Oil Company's books. That automobile was one Doan and I purchased, a Cadillac, at Fort Worth.

The document was marked Plaintiff's Exhibit No. 40.

(Testimony of B. T. Dyer.)

Plaintiff's Exhibit No. 40.

THE WESTLAND,

Harry L. Bowman, Manager.

Wichita Falls, Texas, Aug. 20/19.

Doan Oil Co.

In a/c with B. T. DYER. [139]

April and May Expenses1000.00

 $\frac{1}{2}$ Cost Automobile Cadillac1332.50

Aug. 15 Paid F. E. Couch

$\frac{1}{2}$ Atty. fees—recording 40 acres and abstracting	25.00
--	-------

 2357.50

That bill was sent to Doan at Shreveport.

Cross-examination.

As to Doan repaying the moneys that I expended, according to the above checks, he gave me \$625 on this Cockerell deal, which is the 100 acres in Stevens County I sold to Couch. As to other moneys being returned to me, some portion of them came out in another account, but the Oklahoma deal never came out. I received a check representing one-half of the sale price of the last parcel of the Oklahoma deal; I think it was \$2090. I have not paid any portion of that money to Doan. I kept the last check and wrote him a letter that I had received this check and that he had not stated definitely whether the Oklahoma deal was our personal deal, or whether it had gone into

(Testimony of B. T. Dyer.)

the Doan Oil Company, and I was holding that subject to our settlement. I have never received the amount of money that I claimed from the Doan Oil Company. As to dividing the profits that accrued, whenever I made a deal in which Mr. Doan and myself were interested, at different periods we would divide up. I don't recall right now ever paying any other money on account of any of these properties other than is shown by the above checks.

In the fall of last year I did go to Fort Worth and established an office for the American Oil Engineering Corporation. I put in a Mr. Spoonts, who had originally been with the Gulf Production [140] Company, as representative there. I was instrumental in having Spoonts go there and open the office there. I oversaw it. Before that time I don't recall right now that I did anything for the American Engineering Corporation. Yes, I do recall selling a Rig to the American Oil Engineering Corporation. That was in the fall of 1919. That rig was a rotary outfit that the North Texas, through me, had turned over to some drilling contractors; they were to use this rig in drilling wells, and when they made profit enough to pay for this rig, then the North Texas Supply Company, through me as their representative, and these drilling contractors, were to share 50-50 in the rig and the business. They did not make a success of their drilling contracts, and wanted to get out from under; they wound up, after a couple of holes, owing the North Texas a number of thousands of

(Testimony of B. T. Dyer.)

dollars, and they expressed themselves as wanting to get out from under. I took the question up with the American Oil Engineering Corporation, and they wanted to have a complete rig on hand in case they wanted to use it quickly, and I sold that to the American Oil Engineering Corporation, which turned around and paid the North Texas Supply Company, giving them a profit of something over \$3000, and balancing the matter up. That is the way that transaction came about. The American Oil Engineering Corporation went on and drilled a hole with that rig. We have not got our money for it yet. I had something to do with the superintending of that work in the fall of 1919. In a general way I had something to do with the superintending of that work for the American Oil Engineering Corporation. The first transaction I had with the American Oil Engineering Corporation was that I went back to buy a pipe-line for them. I was going to handle it through the North Texas Supply Company. The American Oil Engineering Corporation was going to build a pipe-line in Oklahoma and I was going to buy this [141] pipe-line for them. That was the first transaction. There was a profit, but the North Texas Supply Company did not wind up with any of it. It went to the Lucey Company. The American Oil Engineering Company might have received a profit in their contract work; I don't know what that profit was. The American Oil Engineering Corporation paid a very high price for the pipe-line.

(Testimony of B. T. Dyer.)

It was sold by the Lucey Manufacturing Corporation. In that transaction I was representing the American Oil Engineering Corporation and also the North Texas. It was agreed that we would have half of the profit, but after the deal was made the Lucey Company said that there was a very little profit in it and they took it all. I instructed the Receiver of the North Texas Supply Company when the check came in to turn it over to the American Oil Engineering Corporation, which was done after a lot of trouble. That pipe was purchased in the fall of 1919, in November.

Redirect Examination.

As to any capital stock for me in the American Oil Engineering Corporation there was held bonus stock, you might call it. When I agreed to give them such services as I could, with the understanding that after I had severed my connection with the North Texas Supply Company I would give them more time, for doing this they agreed to carry me for a portion of their stock which was being held in escrow at par; in other words, Sanderson and Porter agreed to give up any of their oil business when they joined the American Oil Engineering Corporation, and for doing that they held a one or two years' option on a block of that stock, and they told me that by my giving them this help they would carry me for a portion of that as one of their family, [142] that the amount would have to be left until a later date, but they would see that I got a good block of it at par in

(Testimony of B. T. Dyer.)

with them. I explained this to Mr. Doan, and this was agreed to be our joint interest.

Recross-examination.

After I had a conference with the American Oil Engineering Corporation, when I told them I could give them no definite answer until I talked the matter over with Mr. Doan. Then I told him of these facts, and he said he thought it was a good idea to be associated with them in that way. They agreed to carry me right along for some of this bonus stock on the same basis that they were being carried. That representation was made to me by Ben Meredith, Mr. Seaton and Hobart Porter. As to the amount of bonus stock for which they were carrying me they could not give me a definite amount at that time, but said that if I would leave it to them as gentlemen they would see that I got a good bit of it. I was not a partner with that concern, nor with those people who offered the bonus stock to me.

Redirect Examination.

I offered to divide that with Doan. I told him all about it.

Recross-examination.

As to fixing the date when I told him that, I think it was in the latter part of November in San Francisco.

Plaintiff introduced into evidence the Charter of the Doan Oil Company, Incorporated, and marked Plaintiff's Exhibit 41, and the only por-

(Testimony of B. T. Dyer.)

tions of which that may be material, show the following: [143]

The incorporators are, Louis Titus, of Washington, D. C., J. F. Lucey, of New York City, L. E. Doan, S. S. Raymond, and J. A. Thigpen, of Shreveport, La.

The business of the corporation, mainly the oil business, Capital stock was fixed at \$500,000, divided into 500,000 shares of the par value of \$1.00 each, and which capital stock may be increased to \$5,000,000. The first Board of Directors are the same as the above-named incorporators, and the first officers are: L. E. Doan, President, Louis Titus, Vice-President, and S. S. Raymond, Secretary and Treasurer. Signed June 27, 1919, and filed June 30, 1919.

Plaintiff then introduced extracts from minutes of Doan Oil Company, which were marked Plaintiff's Exhibit No. 42, certified by the Secretary. The following are such portions of said Exhibit as may be material:

"Next appears Report of a meeting held in the office of Thigpen & Harold, Attorneys, First National Bank Building, Shreveport, La., on June 27, 1919, L. E. Doan, Louis Titus, S. S. Raymond, and J. A. Thigpen being present."

"President Doan reported that (prior to incorporation) he had purchased the following oil leases which were conveyed to him as Trustee:

(Testimony of B. T. Dyer.)

Pugh lease	8,025.00	
Oklahoma Lease	8,060.00	
Burkburnett lease	40,000.00	
Comanche lease	1,000.00	
Looney lease	8,800.00	
47-acre Bull Bayou lease		
.....	3,547.50	\$69,432.50

Also that he had made the following disbursements for the benefit of the company: [144]

Looney Lease equipment ..	3,000.53	
Sundry expenses	1,614.09	
Automobile equipment	2,797.52	\$7,412.14

Also, that the Leonard Lease in Pine Island was purchased in the name of Doan Oil Company, and on which he had personally made the initial payment of \$10,000.00.

Also that he had sold the Oklahoma lease for \$8,917.50.

ee. It was unanimously voted that the above report of the President be received and that stock be issued to him at the par value of \$1.00 per share for each and every dollar he had paid out, as shown by the above report.

ff. President Doan reported Sundry Disbursements on account of Bull Bayou Wildcat aggregating \$5,359.75, which report was unaninously approved."

"Next appears the subscription agreement executed by the original subscribers to the stock of said company, dated June 27, 1919, before H. C.

(Testimony of B. T. Dyer.)

Walker, Jr., Notary Public, attested by W. B. Winston, and S. L. Herold, which shows that Louis Titus subscribed for 150,000 shares, J. F. Lucey by Louis Titus for 50,000 shares, L. E. Doan for 98,000 shares, S. S. Raymond for 1,000 shares, J. A. Thigpen for 1,000 shares."

"Next is shown a meeting of the Board of Directors held November 10, 1919, all directors being present at which meeting the following proceedings were had."

"A resolution was adopted in substance that the company offer for sale 100,000 shares of its capital stock at \$1.00 per share, payable one-half on or before December 15, 1915 and one-half on or before January —, 1920, and that all said stock be first offered to the stockholders as follows: [145]

50,000 shares to Louis Titus.

33,333 shares to L. E. Doan.

16,667 shares to J. F. Lucey.

and that if any stockholder failed to take and pay for the stock so tendered him that the Board of Directors would decide what further action should be taken with reference to disposition thereof.

e. By resolution the salary of President L. E. Doan was fixed at \$1,000.00 per month.

6.

"There is next shown a meeting of the Board of Directors held at the office of the company November 12, 1919, present:

(Testimony of B. T. Dyer.)

“Directors Doan, Titus, Stephens and Raymond at which the following proceedings were had:

a. L. E. Doan, Jr., was made Assistant Manager of the company, authorized to sign checks for and in behalf of the corporation, and directing the Secretary to certify the fact to the First National Bank of Shreveport.

b. President Doan reported that the corporation had the right to claim discovery re-valuation of its Pugh lease with reference to Federal Taxes and that its geologists had re-valued same at \$434,-511.00, based on an estimated oil content of 228,-691 barrels such valuation being as of date October 26, 1920.”

Plaintiff offered extract from the journal of the Doan Oil Company marked Plaintiff's Exhibit No. 43.

General objection interposed, but no objection to the form. Said exhibits are not material to the issues presented on this appeal.

Thereupon the plaintiff rested.

Defendant at this place introduced the cross-examination from deposition of EDWARD J. BUCKINGHAM. [146]

Cross-examination of Edward J. Buckingham.

I was President of the American Oil Association. At the first conversation I had with Dyer with reference to some Louisiana property, Doan was not present. He told me about one of the wells coming in and he thought it would be a good chance

(Deposition of Edward J. Buckingham.)

for me to get some acreage that they had been taking down there. Dyer said Doan was more familiar with the conditions of this tract and the location than he was and that he would rather I would come down and have a talk with him. I think this conference was in October, 1919. Dyer said he and Doan owned some five or six thousand acres out there. That same evening I went to see Doan. Dyer said to Doan, "I told Buckingham to come down and go over the situation with you"; then Doan described it and told me about the property. The next day I told Dyer I would not take it. After that conversation I occasionally saw Doan again and usually spoke to him. It was two months anyway before I saw him again. I asked Doan whether he and Dyer were still partners. I had entered into an agreement with Dyer to drill on a tract of land in Louisiana and he said he was forming a company in New York which would take it over; and I have not seen Dyer from the time that contract was taken back to New York by him and accepted and signed by the American Engineering Company, and I had an idea that they had dissolved their partnership, or were creating another organization; I had not talked with Dyer since he came back. This drilling contract was made by Dyer and taken over by the American Oil Engineering Company. It was made personally by Dyer with my company. I don't know that Dyer and Doan had any office in Fort Worth. I never say any *placate* or sign Dyer and Doan or Doan and

(Testimony of L. E. Doan.)

Dyer. I was never paid any money or check by Doan or Dyer at any time. I never had any business transactions with them that would require any consideration to pass. [147]

Testimony of L. E. Doan, for Defendant.

L. E. DOAN, called as a witness for the defendant, testified as follows:

I reside in Shreveport, Louisiana, and have resided there since about April, 1919. Before that I resided for a few months in Texas, and prior to that for many years in California. My first experience in the oil business was in 1881. I was employed at that time by D. G. Schoffield who was head of the Continental Oil and Transportation Company. They sent me to Stockton as Branch Manager and I was there three or four years, until they sold out to the Standard Oil Company. After that break in the oil business I did not get back until about 1900, and have been engaged in it practically ever since. From 1900 to 1918 I was engaged in the oil business at Bakersfield and Midway, and different fields in California. Along about 1900 I organized four or five oil companies at Bakersfield and drilled quite a number of wells in the Kern River field, and also in the Sunset field, Midway field; some of those wells, being wildcat wells, were failures, but there was one success. I think I drilled the first Sunset well that was drilled in the Maricopa Flat, the Maricopa field. Then I became engaged as a broker. The

(Testimony of L. E. Doan.)

Kern County Land Company—Haggin & Tevis—had many thousand acres of land in the Sunset oil field that they wanted to sell, and they made an exclusive arrangement with me to handle all those properties. I was handling that for some time. I sold a great many hundred acres of land for them. In that way I became familiar with the oil fields of Maricopa and Midway; I made a study of it. I was in the oil fields a great deal of the time, and I got familiar with the properties, and I commenced to interest my friends in propositions that looked good to me. I would get hold [148] of propositions, and would get options on them and sell them. While there were intervals of quiet when there was not much doing, I followed that business for many years, and sold a good many million dollars worth of property to my friends in California, and in the great majority of cases they made money out of everything I sold, because I was very particular never to present a proposition to anybody that I did not absolutely feel was good.

I purchased some properties on my own account, but my general business was in the nature of a brokerage business. I cannot recollect exactly when I first met Dyer. My first remembrance of him was in Bakersfield, I think in 1907 or 1908. He was associated at that time with Leland. I used to see Dyer very frequently at that time, but had little acquaintance until some years afterwards. I became better acquainted with him along in 1914 and 1915, when we became very well ac-

(Testimony of L. E. Doan.)

quainted. Along in 1914, 1915 and 1916, during the time of the big controversy between the United States Government and the oil men of California over the located lands in Kern County, a great many of my friends were interested in the located lands down there, and I was interested to some extent; at that time the Government had commenced to take a lively interest in the matter, and it became evident that some measure would have to be adopted for the protection of the owners of those lands, these locators, otherwise the United States Government might confiscate the whole thing. So, in conference with a number of my friends I volunteered to get an organization together for the purpose of sending a number of oil men to Washington in order to get legislation to protect the oil men of California. I worked, I guess, a solid year on that proposition. I traveled all over California, at my own expense; I held mass meetings in the oil fields, and interested the oil men of California [149] until finally I perfected an organization; I got nearly every oil company in California interested in that organization.

The first business transaction Dyer and I ever had together was after we got offices together. Before we had offices together, I used to meet Dyer frequently at the Palace Hotel in San Francisco, where both of us made our headquarters. The first that I recall is that Dyer met me one day and proposed that we go into partnership. He said, "Larry, I would like to go into partnership with you; I would

(Testimony of L. E. Doan.)

like to go in with you." This was along about 1915 or 1916. I told Dyer I did not want a partnership with anybody, but that there was no particular reason why we should not do business together in a great many different ways whenever the opportunity came along, so it was arranged that we get offices together. Dyer already had offices in the Balboa Building and he asked me if I could not join him there, which I did. I had no arrangement with him other than we were operating separately and distinctly. We just had offices together in the same three rooms. Dyer's name was on the door, and also mine. He occupied one room and I another; we had a joint entrance room, stenographer and typewriter. We joined in the office expense and settled those expenses every month. We never had a joint account anywhere. While we were in the Balboa Building we were jointly interested in several deals. The first, I think, was with the Associated Oil Company. They wanted to get some lands and I told Dyer if he knew of anything and could get hold of it I would turn it over to the Associated and would divide the profit with him. This I did. During this time I made independent investments in which Dyer had no interest at all and Dyer also did so. There were several deals made on which we divided commissions during that time. When I first went in there [150] I was engaged as manager and one of the owners of the Casmalia Syndicate, a corporation doing business in the Santa Maria field, and it required a great deal of my time.

(Testimony of L. E. Doan.)

In 1918 there was a great excitement in Texas. Oil had been discovered in the ranger field and the papers were full of it. Dyer was one of the first who wanted to become interested in Texas. He went there in the summer of 1918 and wanted me to go along with him and I told him that I could not go; that I had much unfinished business in California and could not get away. He went back and sent me many telegrams urging me to come on, but I could not go at that time. I have not those telegrams for the reason that when our offices were closed in the Balboa Building I was in Texas and Dyer had come out to California. I instructed him that, so far as my interests were concerned in the office, to sell my furniture and box up and send my papers and files to Texas. When I had gone to Texas I had taken my books of account and things of that kind with me, but I left many files, all, in fact, at the Balboa Building office. Upon Dyer's return from Texas he told me there was a wonderful opportunity there to make money and wanted me to go back with him, but even at that time I could not go, so he returned to Texas. I told him that I would go back as soon as I got my affairs in shape. I told him that I would go back and look the situation over before I would determine on whether I would become interested, or not, that what little money I had I was afraid I would lose it; I had been in the oil business a great many years, and I did not want to invest my own money in oil operations, because

(Testimony of L. E. Doan.)

even where the opportunities are the best it is a hazardous game, and that I would go back and look the situation over before I would determine on whether I would do anything else. I did not make the following statement to Dyer: "You go back [151] there and I will follow you up and we will hit the ball and make some money and divide the profits." I absolutely had no agreement with Dyer before I went to Texas whatever as to any business and there was no understanding whatever except that I was to go back to Texas. I left for Texas the latter part of October, 1918. My recollection is that I met Dyer in San Antonio, Texas, the latter part of October or the first of November. We had some transactions in Texas. The first occurred in November or December, 1918. That was the deal for the purchase of eight or ten thousand acres or leases in Bosque County. Dyer asked me if I would not purchase this lease from a man named Pyron and if I did not think it would be a good buy, so I purchased the leases and paid Pyron 50¢ an acre. The leases were assigned to me and I advanced the money. I told Dyer that after the leases were sold and I had my money back that I would give him one-half of the profit on that deal. The leases were subsequently sold by Dyer. I was in California at the time. They were sold in my name. I gave Dyer a power of attorney to sell before I left. I told Dyer to go ahead and use his own judgment and sell the leases. He sold them to the Gulf Production Company at a profit, I

(Testimony of L. E. Doan.)

think, at \$1.25 an acre. When I returned Dyer gave me a check for what I had expended on the leases and one-half of the profit over and above that.

The next transaction was a deal in Stevens County, Texas. I was in California at that time. Dyer wired me about the property and I had become familiar with the district before I left. That wire was in the files at the office at the time I left and Dyer closed the office and never has sent me those files to this day. That is why I have not any of those telegrams. The contents of that wire, as near as I can recollect, were that he [152] wanted to get my consent to purchase that property and I wired him back, "go ahead." It would involve about \$20,000. He wired me that he thought he could sell it before the second payment would fall due. I wired him that I expected that he would have to put up the balance of this money, that I was prepared to do it, and for him to make the first payment; this he did; he paid \$1250. Immediately upon my return to Fort Worth I paid him \$625, which was one-half of the initial payment. The property was sold to Couch before the next payment became due. There was a profit earned and Dyer gave me a check for one-half the profit. I don't recollect any expense connected with that transaction. The only expense connected with it was taken out of the settlement, whatever it was. I had no expense.

The next transaction was the Eastland County deal with Olcott for 240 acres of land. I

(Testimony of L. E. Doan.)

believe he paid \$65 an acre for it. Dyer paid \$500 as option money and I gave him \$250 of it back. Later on I paid \$15,100 as a full payment for the full property. I told Dyer that I would divide the profits with him on that deal. The property was sold by Olcott, the man we bought it from, to other people. The money was returned to me and the profit was divided with Dyer, less his expense and attorney's fees. I think he paid \$100 attorney's fees for examining the title; he took that out. I did not deduct any of my expenses.

The next venture I think was the Oklahoma five-acre piece. I mean the Burke-Burnett five-acre piece. \$40,000 was paid for that. I paid the money. Dyer did not advance any. It was subsequently sold for \$50. Title was invested in my name and I afterwards transferred it to the Doan Oil Company, and the Doan Oil Company sold it for \$50. With reference to the purchase of that tract, that transaction happened in this way. There was an [153] enormous pool in the Burke-Burnett field, what was known as the Burke-Wagner well and several other big wells had been drilled at different points in this field, and there were wonderful producers, 2000 and 3000 barrels, in it, in shallow territory. A well had been drilled in Block 75 in which this five-acre piece was located, producing about 3000 barrels a day. A man by the name of Lamb came to me in Fort Worth, he had an option on this five-acre piece, and asked me to become interested in it. I was unable to go to

(Testimony of L. E. Doan.)

Wichita Falls at that time, however, for some reason or other, so I asked Mr. Dyer to go up and look this property over, and ascertain beyond doubt if it was an absolutely sure piece of property as we were paying \$8000 an acre for five acres of land, and I wanted to have the "dope," as we call it, on all the surrounding wells; I wanted to know what, if any, salt water wells or dry wells were drilled in that vicinity, and I sent him up there to get those facts, and I told him that if he found that there were no salt water wells, and if everything was absolutely all right, that I would buy the property. He got me on the telephone the next day after he got up there. He told me that he had investigated, and that there was absolutely no reason in the world why the property should not be good, so I authorized him to draw a check of \$10,000 on my account. Dyer requested me especially that he would like to have it appear that he was making this payment; he did not have the money, and so I arranged with him that he could draw a check when he got up to Wichita Falls for \$10,000, and I went to the bank, the First National Bank, and told them to honor that check of Mr. Dyer's on my account when it came in, and it was charged to my account. I made the further payment of \$30,000. That happened about two weeks later. In the meantime I went up [154] to Wichita Falls and was there on the day this \$30,000 fell due.

Dyer, my son and myself went out to the property. We had talks all day about it. I asked Mr. Dyer

(Testimony of L. E. Doan.)

what was the latest dope on the offset well that was being drilled adjoining this property. Mr. Dyer told me that he had gotten very close to those fellows up there that were drilling that well, and that he had been with them constantly, and that while the well was apparently down to the depth where it should have been a finished well, that they claimed that they had not got into the oil section, they were about to get into the oil sand, but they had some little trouble, and Dyer said that he was absolutely sure that they were telling him the truth about it; he took me out and introduced me to the men and I talked with them myself. I told Dyer that I was afraid those fellows were stalling, but he assured me that he did not think so; we talked about it several times during the day, and I waited until the bank was about to close at 3 o'clock, and finally I went in and made the payment. Dyer did not have anything to say to me to the effect that he was advised against paying the remainder of that \$30,000. He did not at any time during that day advise against completing that transaction. Dyer never paid any part of the \$50,000 that was invested in Burke-Burnett.

The next transaction was the Oklahoma deal. It was a purchase of a half interest in eighty acres with Mr. Couch in Tillman County, Oklahoma. Mr. Couch had made a deal for the purchase of 80 acres of leases in Tillman County, and offered me an opportunity of going in with him on the purchase of that land; he had already purchased, as he had

(Testimony of L. E. Doan.)

already paid \$1000 as good faith money, and there was some few days left in which to pay the [155] balance of the purchase price; it was a cash transaction; so I told him yes, I would take it.

Q. (Mr. METSON.) You told whom?

A. I told Couch—I am not positive whether the conversation was directly with Mr. Couch or whether Mr. Dyer took it up with him. Mr. Dyer might have been with Mr. Couch at the time; I don't remember about that. But anyhow, I told him I would take it, and when this balance of the purchase price, \$8060, fell due, I agreed with Mr. Couch I would go up there and see the attorneys, and if the title was all right, that I would pay this purchase price, I would pay this \$8060, and he would refund me the difference to make up his half; he had already paid \$1000; so I went up there and the title was all right, and I finally purchased it. I paid \$8060, and Mr. Couch subsequently refunded me, I think, \$3530, which left the purchase price for my half about \$4600, something like that, \$4630, I think. At the time this property was purchased, I told Dyer that if there was a profit made that he would share in the profit. It was transferred to the Doan Oil Company.

As to other transactions in Texas in which Dyer was interested the only one was the North Texas Supply Company. Dyer offered me many propositions in Texas which I rejected. Those were all that were consummated in which he was interested.

In April and May, 1919, I went to Louisiana and

(Testimony of L. E. Doan.)

purchased 40 acres in the Bull Bayou field, the Pugh lease; I purchased it from Clark and Greer. I didn't say anything to Dyer about that purchase prior to its acquisition. I paid the purchase price with my own funds. While I was in Texas, before I went down to Louisiana, I had one or two independent transactions in which Dyer was not interested. I made a purchase or gave \$1000 to the Wehr-Haywood Syndicate for an interest in their syndicate. Dyer never became interested in it; he never gave me any of the money; [156] he never offered to pay me, and nothing was ever said whether he was interested or not. As to the Louisiana purchase I don't know how long afterwards I communicated that information to Dyer. It was my recollection that Dyer was in California when that transaction happened. Titus and Captain Lucey were interested with me in the Louisiana purchase. Lucey was not interested at the time it was made, but subsequently became so. Mr. Titus was. I returned to Texas two or three days afterwards. I conversed with Dyer with reference to the Louisiana purchase in May, 1919. I don't remember any specific conversation. Some time in April or the first of May, I told Dyer that I was going to operate in Louisiana in association with Titus and that that proposition in Louisiana would be on an entirely different basis from anything that had been, that we had talked about before, any deals we had before—that Mr. Titus would be interested in everything with me in Louisiana. Dyer at that

(Testimony of L. E. Doan.)

time did not say anything with reference to any interest he might have there. As to any conversation in which I advised Dyer that I was not going to operate further in Texas. I told Dyer that on account of the business subsiding, that the excitement was over, that it was a dangerous thing to speculate in leases, that I had about concluded that I would not venture any further in that deep territory, that I was afraid we would not be able to sell any leases, and I concluded that I would not put any more money in. About that time Titus came out to Texas. Titus, Dyer and myself made a trip through the Texas oil fields for three or four days. Dyer was with us on the entire trip. I don't think there was any conversation at all in regard to Louisiana on that trip. Shortly after the middle of May, Titus and myself went to Louisiana. No, Dyer did not accompany us. He knew we were going. He was not [157] invited to go. Titus and I spent several days in Louisiana and bought an additional piece of property and bargained for a third piece. We bought one piece for \$110,000. We made a payment of \$10,000. I gave a check for it with my own money and some money Titus gave me. I credited in my own account, the whole thing, as trustee for Mr. Titus and myself at that time. The balance of the \$110,000 was paid by the Doan Oil Company, I think. There might have been another payment made by me, before the Doan Oil Company was organized, but the books will show. Dyer paid no part of the purchase price

(Testimony of L. E. Doan.)

and had nothing to do with that transaction. Dyer never had anything to do with any transaction in Louisiana, because I told him that I was not going to take him to Louisiana and I did not want him down there, and he was never permitted to go to Louisiana. I told him that several times. The first time was when we talked about the 40-acre proposition. That must have been early in May. As to the North Texas Supply Company being organized; immediately after being with Titus in Louisiana I returned to Fort Worth and met Lucey there. Lucey, Mr. Carr, my son and myself made a trip to Wichita Falls. We arrived there in the morning and returned to Fort Worth that evening. It was the latter part of May, 1919. When we returned to Fort Worth we met Dyer in the Fort Worth Club. We went into his room immediately from the railroad station. It was seven o'clock in the morning. The first thing that was said was by Captain Lucey. He addressed Dyer as, "Good morning, Mr. President." Mr. Dyer said "What are you talking about, what do you mean?" Mr. Lucey said, "We have made you president of a supply company, we are going to make you president of a supply company." Mr. Dyer said, "Well, I object, I will have something to say about that, I do not want to go into the supply business." Mr. [158] Lucey went on to explain that he had gone to Wichita Falls, and he had come to the conclusion that Wichita Falls was one of the best places in the United States for a supply house for oil opera-

(Testimony of L. E. Doan.)

tions generally, and that he had outlined a plan with me for Mr. Dyer which would be of great benefit to Mr. Dyer, and that he hoped that he would find his way clear to take advantage of it. As to details, he said that we had concluded to form a corporation of \$100,000 capital, of which \$50,000 would be paid in, and concluded to make Mr. Dyer president and manager; that he would take 20,000 shares of the stock and pay in \$10,000, and wanted Dyer to take 10,000 shares, and he wanted me to take 10,000 shares; he wanted Mr. Titus to take 10,000 shares, and the balance of it would be distributed to his subsidiary branches, to his different branches; he wanted his employees to become interested in the company. Captain Lucey said that if we organized the company that he would back it up with almost unlimited credit, put it in a position where it would make money, a lot of money, and said there was no reason in the world why a supply house up there could not make all the way from \$10,000 to \$25,000 a month, even on a capital of \$50,000, with the backing that he would give it. I told Dyer he would have a salary of \$500 a month. He told Mr. Dyer at that time—he said, “Tom, you have often expressed a desire to become associated with me in business”; he said, “This is your opportunity.” He said, “You have been knocking around the oil fields for a great many years, and you have not landed anywhere, and you have not been able to make a success, and you are now arriving at a time in your life when you ought to save something

(Testimony of L. E. Doan.)

for your family, and here is an opportunity where, with a little investment here you will soon acquire a substantial interest which will earn you an income sufficient to support your family, sufficient [159] for all future wants. "Mr. Dyer did not seem to be persuaded. Dyer said he did not like the supply business, he said that he was an oil man, and did not like the supply business. I joined in the conversation and advised Mr. Dyer to accept the proposition. I had a further conversation with Dyer on that day. Just Dyer and myself were present. I told Dyer that during this trip to Wichita Falls I had talked to Captain Lucey and Captain Lucey had wanted to join Mr. Titus and myself in these Louisiana oil operations. I told Tom I had absolutely concluded that he could not go to Louisiana, that this was an operation for Mr. Titus, Captain Lucey and myself. "Now, I says, "Tom, you have got a crowd of fellows from California, and you have \$50,000 subscribed for an oil venture in which they have agreed to carry you for a quarter interest," and I says, "Captain Lucey has expressly stated in this agreement if you will go to Wichita Falls that he will not object to your indulging in oil operations where it does not interfere with the operations of the company; you can organize this \$50,000 oil company, and with your 10,000 shares of stock in the North Texas Supply Company"—and Captain Lucey had agreed also with him that if he remained there and handled the business and carried out the contract, that he would be entitled to a

(Testimony of L. E. Doan.)

bonus of 10,000 shares of stock in the North Texas Supply Company—if he remained there until the company had earned \$100,000 and was taken over by the Lucey Company—if it was taken over by the Lucey Company—if he would remain there until that time. I said, “Tom, there is a wonderful opportunity for you; there is no question in the world but what this North Texas Supply Company will make a lot of money. Now, if you will go up there and do all these things, organize this California Oil Company, organize two subsidiary drilling [160] companies and rig-building companies, which Captain Lucey was very insistent upon at that time, in order to create a market for his supplies, and also to make a contract on these rig-building companies—“If you will go up there and do all of these things,” I said, “Tom, I will tell you what I will do; By George, I will carry you for an interest in Louisiana.” I went on further and said, “Now, I am not going to tell you what that interest will be, Tom.” I said, “You know that I have got a controversy on with the United States Government over taxes”; there was a controversy in regard to about \$50,000 of income taxes, that I didn’t know but what I would be called upon to pay it, and I said, “I cannot afford to jeopardize my personal interest in any way by tying up to you or anybody else until I know where I stand, because I have got to be in a position at any moment to raise this \$50,000, if the Government calls upon me for it; I

(Testimony of L. E. Doan.)

have got to keep my securities intact; but, however, if the Louisiana venture is a success and you go to Wichita Falls and carry out your contract, I will carry you for an interest in Louisiana." After a few minutes he said, "By George, I will do it." I said, "Tom, don't you go there now unless you have absolutely made up your mind you will go there and stay there, because," I said, "you know you are in the habit of traveling around the country a good deal; we want you to go there and live there, and make that your headquarters—not only make it your headquarters, but you have got to stay there and take advantage of the opportunities as they come along." And he said he would do it. The company was formed immediately afterwards and Dyer went to Wichita Falls. He remained there about two weeks and then went to California where he remained in the neighborhood of three weeks. He made two or three trips to California during that same year and made [161] several trips East. I know that he was absent from Wichita Falls the greater part of the time. He did not form the subsidiary companies of the North Texas Supply Company. He formed one, but he didn't form the Rig Company or a drilling company and he did not form his California Oil Company. I think it was on January 21, 1920, that Dyer first told me he had become associated with the American Oil Engineering Corporation. That was at Fort Worth. He said that, he demanded of me to settle his interest in the Louisiana field; he wanted to

(Testimony of L. E. Doan.)

know what his interests were in the Louisiana operations; he wanted them settled. Previous to this time Mr. Dyer and I had had many controversies. Dyer told me at that time that he had accepted employment, that he had accepted a retainer from the American Oil Engineering Company, and they were paying him \$1000 a month, or had been paying him \$1000 a month to look after their interests in Texas. Well, I protested and told Mr. Dyer that it was a violation of his contract with the North Texas Supply Company, that he had not organized his California Oil Company, that he had not done any of the things that he had agreed to do when he went to Wichita Falls, and now this was the last thing, the last straw that he had accepted employment with another company, which he should not have done under any circumstances without taking it up with the Board of Directors of this North Texas Supply Company and getting my consent to it. Well, he said that these folks were going to put a million dollars into the oil business, and something of that kind, and he thought it would be a great opportunity. I told him I did not care anything about it at all, and after a very heated discussion—Dyer and I had a very heated discussion at that time, and we had had previously, over the same argument, Dyer made a demand on me for a half interest in [162] my interest in the Doan Oil Company at Shreveport, and I told him that he was not entitled to anything. I said, “Tom, you have not carried out your agreement in any particular;

(Testimony of L. E. Doan.)

you did not go to Wichita Falls; you did not stay at Wichita Falls; you did not organize your California Oil Company; you did not take your stock in the North Texas Supply Company; you did not earn your bonus stock, and you are not entitled to anything; Tom, you are not entitled to absolutely anything." I said, "I wanted you to make some money, I wanted to help you, that is the reason I wanted you up there; I wanted you to make some money and build you up." Well, we had very hot words over the proposition, and finally Tom said, "I can raise the money to take my interest in the Doan Oil," and said, "I have always been ready to do it." I said, "You have not been ready to do it, and you can't do it, and you have never offered to do it." I said, "I will tell you, Tom, I am hard up right now, I have got to borrow some money, if you will pay me the money that you owe me, that I advanced you in California before you came out here, if you will take your North Texas Supply stock, get that North Texas Supply stock that you subscribed for and pay me \$1 a share for the Doan Oil Company, the same as I paid for it, I will give you 50,000 shares of stock." He said, "All right, I will do it." He sat down and wrote me out a check for \$3000 on the payment of the back indebtedness, that Tom had owed me on money that I had advanced him in California; he told me he would send me the rest of the money the next day, \$3000 more the next day, that he would immediately go to California and get his North Texas Supply stock and all that stuff.

(Testimony of L. E. Doan.)

So, relying on that proposition, I felt really relieved, because the thing had worried me; I was pretty worried. I did not want to have any controversy with Tom; [163] By golly, Tom and I had been very intimate friends for a good many years; I did not want to have any controversy with him. So I told him if he would send that money the next day and get this North Texas Supply stock, that I would let him have 50,000 shares of the Doan Oil Company. Tom said at that time, "I was expecting to send you this \$6000, because, he said, "I owe it to you; it was a loss that we made in this money you had advanced in the Doan Syndicate at Santa Maria, and it was a loss, and I have already charged it off in my income statement, \$6000," and he said, "I was going to send it to you anyhow, because I have already charged it off." So he did not send me the money. Two or three days afterwards I received a letter from Dyer.

The letter was offered in evidence as Defendant's Exhibit "C."

Defendant's Exhibit "C."

"AMERICAN OIL ENGINEERING CORPORATION.

56 Broadway,

New York.

Fort Worth, Texas, January 21st, 1920.

Mr. L. E. Doan,
Merchants Building,
Shreveport, La.

Dear Larry:—

I am going to hold off the getting of the \$50,000.00 until the last minute after you have had your meeting with Mr. Titus and decided on your policy. I will not do this to inconvenience you but for the purpose of being guided in getting my money. It will of course be necessary for me to give up a small piece of it in order to get this money but should you decide on a sale policy, either of land outright or stock that would reimburse present holders, I naturally would want to take advantage of that and not give up any interest other than is necessary.

This feature dawned on me after you left last night and I wanted to explain it to you for your approval.

We are having another rotten day with a cold rain [164] and some sleet. I am leaving for Wichita falls tonight.

You will possibly remember that Messrs. Heyd-rick and Couch drilled a well in West of Grand-field some years ago and encountered a small sand

(Testimony of L. E. Doan.)

with an oil showing but nothing of commercial quantity. Mr. Hoffer informed me this morning that he and the Humble Company were of the opinion that that is about all the present wells amount to that have been so highly advertised. He will have the detail information in a few days or two and offers to give it to me. I will try and get some accurate information if possible and act accordingly.

With best regards, I am

Very truly yours,

DYER."

BTD/H.

I made a reply to that letter.

Letter introduced as Defendant's Exhibit "D."

Defendant's Exhibit "D."

DOAN OIL COMPANY, INC.,

Merchants Building,

Shreveport, La., Jany. 23.

Dear Tom:

I am in receipt of yours of the 21st and will state that there is no possibility of our making a sale of any property within the next few months. If we do the money would not go to Stockholders, but would go into the treasury for expansion purposes.

If you are unable to arrange for your money by the first of February we will have to change our plans somewhat because—I will have to raise some money at that time and I am depending on you.

(Testimony of L. E. Doan.)

Let me know at once so I can make my arrangements accordingly.

Titus has postponed his trip for a few days.

If you have to give up one quarter to raise your money I will do it for you on the same basis.

Let me know by return mail what you want to do about it.

Sincerely yours,

DOAN." [165]

I received a letter from Dyer as follows:

Letter introduced in evidence as Defendant's Exhibit "E."

Defendant's Exhibit "E."

**"AMERICAN OIL ENGINEERING
CORPORATION.**

56 Broadway,
New York.

Fort Worth, Texas, January 26th, 1920.

Mr. L. E. Doan,
Merchants Bldg.,
Shreveport, La.

Dear Larry—

I have your letter of the 23d and I explained to you when you were here, it was agreed that I could obtain this money by giving the one-fourth interest mentioned. You ask me to write by return mail and state that you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis as it

(Testimony of L. E. Doan.)

would eliminate having any outsiders or any complications. If this is agreeable to you, please drop me a line and I will go no further to obtain this money on the outside.

I want this absolutely agreeable to you either way and if you prefer to have me get the money advise me and I will get it at once.

I have been about sick with a touch of the "Flu."

Please advise me, and with kindest regards, I am,

Very truly yours,

B. T. DYER."

BTD/H

I also received a letter from Dyer—marked Defendant's Exhibit "F." [166]

Defendant's Exhibit "F."

**"AMERICAN OIL ENGINEERING
CORPORATION.**

56 Broadway,

New York.

Fort Worth, Texas, February 9th, 1920.

Mr. L. E. Doan,

Merchants Bldg.,

Shreveport, La.

Dear Larry:—

Mr. Couch has given me a check for \$2700.00 which is one-half of the selling price of twenty acres out of the Tillman County property. As I understood it this went in to the Doan Oil Company. Will you please advise me if this is correct?

If not it will belong to us. I am endorsing same to the Doan Oil Company. The balance of this lease was sold in two pieces, one of 20 acres and one of about 15 acres. The remaining fifteen acres has been sold and a payment is up on it, but the buyers are trying to back out, all the excitement having died out in this locality. In the new survey it develops that there were only 35 and a fraction acres instead of 36.6. There is a payment of \$2500.00 up on the balance of the acreage and I will advise you as soon as the matter is settled.

I have not had a letter from you in answer to my last letter asking if it was agreeable as you had mentioned on the carrying of my Doan Oil Company interest. When you get time I would like to know how things are going with you.

I have just completed the purchase of a dandy lease in Stephens County for my New York friends having paid \$1,000,000.00, one-half cash, for a fine piece of ground. One well producing 1600 barrels daily and three wells are drilling. Things are going satisfactorily at ~~Fort Worth~~ Wichita Falls.

deals

I have made no ~~terms~~ on our personal account but I am working on a good one at the present time and will advise you what happens.

Please acknowledge attached check and also if this is Dean Oil Company money.

Very truly yours,

B. T. DYER."

BTD/H.

(Testimony of L. E. Doan.)

“When your bookkeeper makes his statements ask him to send me one please.”

After I received these letters from Dyer I discussed them [167] with him at Shreveport some two or three weeks later. Mr. Dyer came to Shreveport and came to the hotel that I was stopping at, the Ury Hotel, on Sunday morning, when I was having breakfast; he came into the dining-room and sat down and said, “I have got a 40-acre proposition over in Oklahoma, and want to borrow \$40,000 on our Doan Oil stock,” he said, “to cover this proposition, to take this proposition up.” I declined the proposition.

Q. What did you say?

A. I absolutely refused, told him that I would not consider the matter for a minute, for the reason that he had not complied with his compromise proposition; he had failed to send me the money that he owed from California, which he promised to send me the next day after the talk we had at Fort Worth, and had made no arrangements about getting his North Texas stock; so I just told him, “You absolutely failed to carry out your compromise proposition, and it is all off.” We got into a very heated discussion, and I got very angry, and I used some language that I should not have used, and which I afterwards apologized for; I sent Mr. Dyer an apology for the language I used. He replied at the time, “You are a hell of a partner,” something like that and walked out. As to the conversation

(Testimony of L. E. Doan.)

held in March or April, 1919, at Fort Worth, which De Sallier testified to in his deposition, I recall that conversation. I did not make the statement that "I could not reach any decision and for him to see Dyer, my partner." What I did state at that time was in substance a great deal of what he has said, except that I did not use the word "partner"; I studiously, I never have used that word in any business transaction that I ever had, because Mr. Dyer and I were not partners, and we understood it that way.

As to the conversation testified to by H. F. Berry at Shreveport [168] in 1920, at my office, I recall that conversation and I did not say my "partner."

At this point the cross-examination of L. E. Doan was deferred pending the examination of other witnesses.

Testimony of Louis Titus, for Defendant.

LOUIS TITUS, called as a witness for the defendant, testified as follows:

I reside in San Francisco and am engaged particularly in the oil business in California and Louisiana. I have been engaged in the oil business twelve years. I recall a trip to Texas with Dyer and Doan early in May, 1919. I went to Fort Worth and met Doan there. We went to Wichita Falls that same night and the next morning met Dyer. Either Dyer or Doan had an automobile, and we spent the better part of three days driving around the country

(Testimony of Louis Titus.)

looking at various oil fields and properties. That was after the first purchase of 40 acres in Louisiana. I discussed in the presence of Doan and Dyer matters relating to Texas oil properties. We had a conversation for three days about various oil properties in which Dyer and Doan were interested in Texas, but there was no such conversation concerning properties in Louisiana. There was discussion with regard to the 5-acre Burke-Burnett tract. That was subsequent to its purchase. Dyer told me that he thought it was a very wonderful piece of property, that he was in very close to the men who were drilling the offset well, and that he was sure he had the right dope on that well, and that they assured him they had a very splendid showing of oil in that well, and he thought this five acres was a very valuable property. I know the time that I met Dyer at Wichita Falls was in May of last year (1919), I met [169] Dyer in San Francisco after he had been through the Texas fields with Doan and myself; that was in July of the same year, 1919. I saw him in my office. I had no conversation with him relating to Louisiana oil properties. He had nothing to say to me with reference to Louisiana properties which had been acquired by Doan and myself. He stepped into my office, and I said to him, "What are you doing here, I thought you were in Texas?" He replied that he had some affairs to attend to, and he had come up to California. I said, "Are you going to stay here long, and when are you going back to Texas?" And he replied, "I do not

(Testimony of Louis Titus.)

want to go back to Texas; I want to go to Louisiana, but Larry won't let me go; he wants me to stay in Texas." That was the extent of the conversation concerning that subject.

Cross-examination.

I went to Shreveport or to Fort Worth first and then to Wichita Falls. We took an automobile and went up to Burke-Burnett fields, where this five-acre tract is, and from there we went to the various oil fields; we spent two days and tried to spend part of another day, but the rain was so heavy we could not get around with the automobile the third day, and we finally took the train back to Fort Worth and left the automobile here. From there I went to Shreveport with Doan. That was not my first trip to Texas, but my first trip to the oil fields. I had sent some money to Doan and I understood that I was interested in the Lamb piece. I could not tell how much I had supplied to him. I think at that time I had sent Doan \$20,000. I did not send him this money for the Lamb piece; I just sent him \$20,000 to be used in the oil game. That was at his request and at my request, too. I wanted to do it and he wanted me to do it. He had [170] been requesting me to go into the oil game. That money was sent probably a month or so before I went down there. I had never been to Shreveport before this time in May. I did not send for Dyer to come to my office. I think it was in July of the summer of 1919, when he was in my office. I did not in that conversation

(Testimony of Louis Titus.)

say to Dyer, "Why are you not down in Texas?" or "Doan needs you," or "I am going down there and I am going to have Doan send for you at once because you should both be there together."

At this point there was called out of order a witness on behalf of plaintiff.

Testimony of Leslie I. Coggins, for Plaintiff.

LESLIE I. COGGINS, a witness called for the plaintiff, testified as follows:

I reside at San Francisco; have been in the brokerage business the last month, New Orleans oil business. I know Doan and Dyer. I saw them in Texas in 1919, I think, around May. I remember an incident when we were taking a trip in an automobile together. Mr. Martin and myself went up to Wichita Falls and we met Mr. Doan and Mr. Dyer, and we took a ride out to see the field, to take it all in. Mr. Martin was there for the purpose of acquiring some land for the Texas Oil Exploration Company, and Mr. Doan and Mr. Dyer invited Mr. Martin out to see some of the property that they owned, saying they owned a five-acre piece there; that they owned together this here five acres, and said, "Mr. Martin, this would be a good place to get in and get some land around here, it is a good spot to get some," and coming back in the automobile we looked across the country, and were talking oil, and everything like that, and said, "It looks like it will run across the river into Tillman County," and coming back in the car Mr. Doan, or Mr. Dyer

(Testimony of Leslie I. Coggins.)

said, "Well, Mr. Martin, [171] some day, you see those tank cars over there, you will see our names on them, 'Doan & Dyer'; we will get it right up here in this little field." We went back to Wichita Falls. Mr. Martin and I left from there and went to Fort Worth.

Cross-examination of L. E. DOAN.

I have talked this case over with Mr. Titus; he is not one of my counsel; he has and still is representing me in a tax difference with the Government, but not in this matter. He has not advised with me at all in this case. I remember when he was in Fort Worth the latter part of May, 1919. It was after the second payment on the purchase of the Burke-Burnett property. He was there at the time the North Texas Supply Company was organized. He had been there about two weeks or ten days before. I met Captain Lucey at Wichita Falls after I parted from Titus. I parted from Titus on that trip at Shreveport. He did not go back to Fort Worth. He left either for Washington or California. I am not sure which. I cannot think of any deals that Dyer and I had other than the ones I have already related. The check shown me has my signature on the back.

Check introduced in evidence and marked "Plaintiff's Exhibit 44."

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 44.

(CHECK.)

"Fort Worth, Texas, Mar. 15, 1919, No. 17.

THE FIRST NATIONAL BANK 37-1 of FORT
WORTH.

Pay to L. E. Doan or order \$750.00, seven hundred
fifty and no/100 Dollars.

B. T. DYER.

(Endorsed: "L. E. Doan.") [172]

I looked upon the Lamb tract favorably and spoke favorably of it when Titus was there. I was a little doubtful about it, but I was confident that the well adjoining had not been thoroughly tested. I changed my mind a little later. I sold it to a man named Carter, a friend of Titus, who I think resides in Washington. That was along in June, 1920. The sale was not for income tax purposes. We had decided to charge the matter off entirely. The land had become absolutely valueless, and we concluded to sell it for whatever we could get for it, and we sold it for \$50. I testified in April, 1920, that I held that land in trust for the Doan Oil Company. I sold it a couple of months after that. The sale was at my suggestion. I took it up with Titus and we decided that the land was absolutely valueless and it would be advisable to charge it off before the end of the year. I made an assignment of the lease, which I acknowledged

(Testimony of L. E. Doan.)

at Shreveport. A resolution was passed by the Doan Oil Company authorizing the sale.

With reference to the Lamb tract, I told Mr. Dyer to go up to Wichita Falls and make a very careful examination of the situation and find out if there was any reason why we should not purchase the property; if there was any dry wells, or salt water wells, or anything that would militate against the value of the property, and that if he found it, all right, I left it entirely to him to go and make a thorough investigation—if he found it all right to let me know by telephone the next day, and I would arrange to draw on me for the money. He telephoned the next day and was very enthusiastic. I was also enthusiastic. It is my recollection that he went up there with Couch, and then Mr. Couch wanted to go in with us on this five-acre piece, if he approved of it. Mr. Couch, it is my understanding, it is my recollection that Mr. Couch wanted to go in on the Burke-Burnett field with me, and we had all been up [173] there, he and I, looking over other properties, and it is my recollection he went up with Mr. Dyer, with the idea of purchasing a half interest in the property. As to my saying that Couch had told Dyer about the dry holes before the Lamb purchase was made, I may be wrong about it and I am inclined to think that the conversation that I had with Mr. Couch was that he went up there with Dyer, and that during the day they were separated, and Mr. Dyer had phoned to me that the proposition was all right

(Testimony of L. E. Doan.)

and that Dyer had purchased it before he had an opportunity of talking the matter over, but that he, Couch, had found out about a well that was drilled about a quarter of a mile south that was a water well, a salt water well, and that he was a little bit afraid that that salt water condition might extend up as far as this property. I remember the conversation I had over the phone with Dyer. Dyer said that he had made a thorough investigation of the proposition, and he did not see any reason in the world why this piece of property was not absolutely all right. Dyer immediately drew on me for \$10,000 and after that I went to Wichita Falls, about some two weeks later I went out several times to the Lamb tract to look at it. I might have gone out with Leach. I went out with Dyer and my son; possibly Leach was along. At that time Couch had told me about the well within a quarter of a mile in salt water. I then put up the \$30,000, but I hesitated to put it up, because I was afraid that these fellows were not telling us the truth, but as near as I could tell, after talking to Mr. Dyer, and after talking to everybody, I concluded that possibly they were telling the truth. I already had \$10,000 in it, and I figured that we might be able to sell it within a few days, or a week or two, and make a profit on it, because at that time there were many transactions; [174] property was selling in the same block for \$10,000 and \$12,000 an acre, and in adjoining blocks \$13,000 an acre, and \$20,000 an acre; so I figured that it was—while I hesitated a little bit I figured it was

(Testimony of L. E. Doan.)

best for me to finish the payment at that time, and I did. When I paid the \$30,000 I was a little skeptical about it. They had been stalling along there apparently for some little time, and I could not understand why they had not made more headway. I knew they were stalling because they were practically in the same condition when I made the second payment as when Dyer made the first payment. They claimed they had a fishing job there and it kept them from going ahead. As to what I said about my files not having reached me I meant to say this, that these files never reached me, that these files were left in the office there, and Mr. Dyer closed the office up and got rid of them. Where they went to, I don't know, but they never reached me. A package reached me that was shipped from the office. I packed a box of books when I left and I instructed the janitor to ship it to me and they arrived in Fort Worth, that was in the summer of 1919. I asked Dyer to send the balance of the stuff that was left in the safe. Dyer told me he closed the office and that he had packed the boxes of my stuff and sent it down to the warehouse. He told me that at Fort Worth. I told him it was all right to keep it until I wanted it, and then I wrote him sometime afterwards to please have those files sent me, and he wrote me that he could not find them, that he had looked since I sent word—I wired him to rush the matter if he possibly could, because I wanted to use them, but I never have seen them. My recollection is

(Testimony of L. E. Doan.)

that the Stevens County deal was made when I was in California. I am quite sure that Dyer telegraphed me from Fort Worth and that the deal was made in February. He wanted my approval [175] of the proposition, which I wired, because it involved the payment of in the neighborhood of \$20,000. Dyer put up the \$1,250 and I refunded half of it immediately upon my return to Fort Worth. That was all the money that was put up. The turn was made and Couch purchased the property before the next payment had to be made. I recognize the papers shown me; one is the contract of purchase of the five-acre Burke-Burnett tract, dated May 5, 1919, and the other is a legal opinion as to title.

The papers introduced as Plaintiff's Exhibits 45 and 46, respectively.

Plaintiff's Exhibit 45 is, briefly, a contract of purchase by Doan from W. J. Wallin of a five-acre oil and gas lease in Wichita County, Texas; the purchase price, \$40,000, of which \$10,000 is placed in escrow as cash payment. Assignment of lease also placed in escrow; if title approved, assignment to be delivered to Doan and he allowed fifteen days for final payment.

Plaintiff's Exhibit 46 states condition of title.

There was some conversation with Dyer about issuing the Burke-Burnett check for \$10,000. It occurred at Fort Worth, before he went up there. Dyer asked me to arrange the matter so that he could draw a check for himself for the purchase

(Testimony of L. E. Doan.)

of that property. The arrangement was made at Fort Worth. Dyer said that he wanted his credit established so as to boost him. He was dealing with other people up there through the banks. Dyer stated to me that he did not have sufficient money and asked me to arrange this matter for him. I first went to Louisiana in April, 1919. Dyer did not go with me. I went alone. I had lots of conversation with Dyer on the proposition of my permitting him to go there. The reason I went there was that I heard there was a new strike in the Bull Bayou district. I met Greer, who owned [176] property there and I went to look at it. I am not quite clear whether Dyer was in Texas or in California at that time. Just about that time I had told Dyer that he would have nothing to do with the Louisiana propositions under any consideration; that I was going to handle that matter myself absolutely. I never asked Dyer to go to Louisiana on business. I may have invited him over there. We were very intimate. I might have asked him over there a dozen times. I don't think I ever asked him to go over and examine that field. I never at any subsequent time asked him to go over and examine any propositions of mine. I never had Dyer in contemplation in any deal I made in Louisiana.

I took over the Giffen well. I think Titus was there at the time. It was about ten days, or a few days before or after I took over the Clark and Greer place.

(Testimony of L. E. Doan.)

The Wehr and Haywood Syndicate was a proposition of one Haywood who asked me to put in \$1000, and I did. He drilled a well, but it was a failure. The property was somewhat south of Fort Worth. That was about May or June. Dyer knew about it. The conversation in May, 1919, with Dyer about Louisiana, wherein I said that my Louisiana operation would be on an entirely different basis was the conversation that I had in the morning that Lucey and Carr and myself returned from Fort Worth after Lucey talked to Dyer. I told Dyer that if he would get his money from his California Syndicate, or if he would take 10,000 shares of stock in the North Texas Supply Company, and pay for it, and if he would organize these drilling companies, and the North Texas Supply Company, and stay in Wichita Falls, and make that his headquarters, and run that business, and devote his whole time to that business, that I would carry him for an interest in [177] Louisiana, provided he done those things. It was entirely contingent on his doing these things—entirely contingent on his doing those things. At that conversation only Dyer and myself were present. Lucey was there and I asked him to retire and I would talk the matter over with Dyer. Dyer had objected to going into the supply business; he said he was an oil man. I said I would talk to Dyer and maybe I could persuade him to go in there. I told him that I was going to Louisiana and that I was not going to take him there and that he would have nothing

(Testimony of L. E. Doan.)

to do with the Louisiana operation. I did tell him that I would carry him for an interest in Louisiana if he would go to Wichita Falls and organize the North Texas Supply Company and become the President of it and stay there and manage it and if he would also in addition thereto organize two drilling contract companies, and also, organize another company, and also, organize the San Francisco crowd. What I told him was, "I will not take you into the Louisiana operations with me," or words to that effect. I told him I would not take him down to Louisiana. I would not let him go in with me in my operations down there, that I was going to handle that proposition myself alone and that I did not want him down there. I do know this, that I told Mr. Dyer that it was time that he settled down into a business and became a fixture somewhere, that he was 45 years of age, or thereabouts, and had a family to look after, and that Wichita Falls offered him the greatest opportunity he ever had in his life if he would go over there and take advantage of the offer that was made by Captain Lucey, on the one hand, and myself on the other, and that if he would go there and stay there and anchor himself there, instead of traveling all over the country on every pretext, as he had been in the past, that he had an opportunity [178] there to make a fortune for his family. Those are the words that I used to Mr. Dyer. As to the capitalization of the Company, Lucey had explained that to him in the morning

(Testimony of L. E. Doan.)

also and we both talked to him about his family and about his duty to go there and anchor himself and quit his rainbow chasing. Dyer was a good man in a boom town, in a speculative business, but as to the selection of oil properties, where it required the investment of a large amount of money, he was not there, he was too visionary, too quick on the trigger, and you could not depend on him.

I preferred to invest my own money in my own way myself. The North Texas Supply Company was to be capitalized for \$100,000. That was told to Dyer. It was agreed that he was to have bonus stock. I was not to share in the bonus stock. Lucey made the proposition to Dyer as to bonus stock. He agreed to give 10,000 shares. He did not agree to carry Dyer for 10,000 shares. Lucey said that if Dyer found it inconvenient to take the 10,000 shares that he subscribed for that he would arrange to carry it for him. He said that at that time. Carr, Lucey, my son and myself and Dyer were present. That was in addition to the bonus stock. I think I had about \$40,000 from Titus before the Lamb purchase. May be it was only \$20,000, but I think \$40,000. Captain Lucey told Mr. Dyer that he considered Wichita Falls the greatest opportunity, the finest place ever to establish a supply company, and for oil operations, that there was in the United States at that time, and that unquestionably if Mr. Dyer would accept this position and go up there and give his whole time to it, not only to the North Texas Supply Company, but to

(Testimony of L. E. Doan.)

drilling companies, and to a rig-building company, and if he had any spare time he could devote it to the oil business on the side [179] in Wichita Falls, that he could unquestionably make a lot of money there. Captain Lucey urged him to go for that reason. Lucey at that time was the head of the Lucey Manufacturing Company. They had no establishment at Wichita Falls and wanted to put one in there. Lucey did not tell me that the Lucey people were under contract not to do business in Wichita Falls. He did say they were not in a position to do business under the name of the Lucey Manufacturing Company and for that reason he wanted to establish a subsidiary there. That would be the North Texas Supply Company. I put in \$5,000 in the North Texas Supply Company for my son. I put in no other money. Captain Lucey was in Shreveport shortly after that. On the 30th of June Lucey, Titus and myself were in Shreveport. That was when we organized the Doan Oil Company. We put up money to arrange the finances of the Doan Oil Company at that time. I endorsed Lucey's note at the bank of Shreveport for \$25,000. I know that Dyer neglected the North Texas Supply Company by going to California. I got that from a good many sources. After the organization of the North Texas Supply Company I was not at Wichita Falls frequently. Since that time I have been there two or three times and never stayed more than one day. I don't know what Dyer came to California for on his first trip after the

(Testimony of L. E. Doan.)

30th of May, 1919. Dyer was at Shreveport a number of times. I did not protest his going over there. I was always glad to see him. I invited Dyer to Louisiana. The San Francisco crowd that Dyer was to organize was a syndicate that Mr. Dyer had told me that he had about \$50,000 subscribed for an oil company which he could call in at any time; in fact, he showed me one or two or a few of the letters, I didn't go through them all, but he assured me he had \$50,000 he could call in at [180] any time into an oil company, at any time that he would send for it. Mr. Everett, I think, was one of them, and I think Mr. Fleischacker was in it, and I think some of the old Alaska Commercial crowd—I don't know what their names are. That \$50,000 was to be put into an oil operation upon land to be selected by Dyer. As to my sharing in the operation, there was no agreement on that. Nothing was said about it at that time and nothing later that I know of, except that I expected Mr. Dyer to go through on all those things if I carried him for an interest at Shreveport, but there was never any statement made on that proposition. It was just an expectation on my part. Dyer was going to be carried by the San Francisco crowd for a quarter interest, as I understand. He told me that. I had an expectation of sharing in that quarter. Yes, that was to be an operation on oil lands selected by Dyer.

I don't know where the tract in Oklahoma is that Dyer wanted to borrow money on this year.

(Testimony of L. E. Doan.)

It was such an absurd proposition that I did not pay any attention to it. The idea of his going to borrow money—for me to borrow money on stock he never had paid for, or owned; why it was perfectly ridiculous. I absolutely told him that I would not think about it for a minute, under the circumstances, because he had absolutely failed to carry out any part of his arrangement. I told him that he had absolutely failed in every respect. He had not organized his oil company, he had not organized his drilling companies, he had not taken his stock in the North Texas Supply Company, he had not done one thing that he agreed to do, not one thing. In May, 1919, I told Dyer that from then on we would have to operate on a different basis. Theretofore, Mr. Dyer had been working with me right along for some time. [181] He would go out and purchase a piece of property, or find a piece of property, and if it looked good to me I would put up the money and purchase it, and I was the boss of that property and the owner of that property; Mr. Dyer never owned a piece of property I ever purchased, although one stood in his name.

Letter identified by witness, introduced in evidence as Plaintiff's Exhibit No. 47.

Plaintiff's Exhibit No. 47.

"B. T. Dyer,
Balboa Building,
San Francisco, Cal.

February 15, 1919.

My dear Tom:

Rec'd your wire of 14th to-day, too late to get in touch with Shoup. Will see him Monday. Glad you got the Bosque lease matter fixed up.

I will not be able to reach Fort Worth much before the 1st of March, but will not be later than that date. Have got to make out my 1918 Income Tax statements and want to close up the Santa Maria transaction before I leave. Woods & Housen promise sure to have everything cleaned up 1st of next week. McLain is working on books and I should have everything completed by end of next week. Will not wait for Emery. Just rec'd a wire from him that he would not leave there for three weeks yet, probably longer, so I will see him then. I wish you would phone him Camp Supply Office—See if there is anything you can do for him, and if he thinks you can help him I wish you would run up there.

Don't you think it would be a good idea for you to go to Houston and Shreveport before I arrive—get things lined up in those fields. Even if Horn (?) & Lucey don't come through, I can depend on Titus, and will want to look all the field over and pick something good. We cannot hurry and we will not lose anything by waiting. There is sure to be

a slump there this summer. The price of oil has already dropped and it will drop more, so there will be plenty of opportunity and many leases for sale. Titus is not worrying about the drop in price of oil. I have predicted all along that there would be a slump. And it will give the bona fide operators a better chance. The price will come back soon as they get pipe lines.

I see by the papers that you are having a storm. I don't suppose we could get around much, on account of weather and bad roads.

With all the different leases we can work when we get started there will be plenty for us to do and we will make good.

I will get hold of Schoup first thing Monday morning. [182]

Everything here is quiet, except that it looks like Oakland would have a general strike and they are talking strike everywhere. I hope Emery will get his discharge soon or he may be detained indefinitely.

With regards to Pyron and all friends,

Sincerely,

DOAN.

Am using your paper because mine is all gone."

Check introduced and marked, Plaintiff's Exhibit 48.

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 48.

(CHECK.)

“Fort Worth, Texas, May 19, 1919. No. —.

**THE FIRST NATIONAL BANK 37-1 OF FORT
WORTH.**

Pay to Cashier's Check or order \$10000, Ten
Thousand & 00/100 Dollars.

L. E. DOAN.”

That check was part of the \$30,000 payment on the Lamb tract. The rest of the \$40,000 was paid by another cashier's check for \$20,000. It was paid at the same time. The first payment at Shreveport I think was the 10th of April.

Document introduced and marked Plaintiff's Exhibit 49.

This exhibit is an acknowledgment before a notary public of J. B. Greer declaring that he grants, conveys and delivers, with full guarantee of title, unto L. E. Doan, his title to certain oil lands in Red Parish, Louisiana, being a portion of that certain lease from J. C. Pugh to Greer, for the consideration of \$8,000 cash. Acknowledgment dated the 21st day of April, 1919. The consideration was \$8,000, first payment made, I think, April 10th, and balance on the 21st.

Check introduced and marked Plaintiff's Exhibit No. 50.

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 50.

(CHECK.)

"Fort Worth, Texas, April 10, 1919. No. —.
[183]

**THE FIRST NATIONAL BANK 37-1 OF
FORT WORTH.**

Clark & Greer Drilling Co., or order, \$1000.00 One
Thousand & no/100 Dollars.

L. E. DOAN.

(Endorsed: "Pay to the order of City Savings Bank & Trust Co., Shreveport, La. Clark & Greer Drilling Co." "Pay to the order of any bank or banker. Prior endorsements guaranteed. April 14, 1919. Federal Reserve Bank of Dallas. 32-3." "Received Credit Through District Clearing House at Federal Reserve Bank of Dallas. Sent Apr. 12, 1910. All Prior Endorsements Guaranteed. First National Bank, Shreveport, La. 84-2." "Pay to the order of any bank, banker or trust company. City Savings Bank & Trust Co. April 11, 1919. The First National Bank, Shreveport, La.")

I think that was the first check. I believe the Giffen property was taken over later. This Greer property went to the Doan Oil Company, also the Lamb tract and the Oklahoma lease. The Doan Oil Company took it over at the same price that we paid for it. Dyer was not interested in any tract that I purchased. Had we made a profit on the Lamb tract I would have considered Dyer entitled

(Testimony of L. E. Doan.)

to a profit in it because he did a lot of work on the purchase of the lands, in negotiating it. As to the Oklahoma tract, I considered him entitled to a profit. I presume I so stated to him at the time. I don't remember any specific conversation.

The North Texas Supply Company was organized for \$100,000, and \$50,000 paid in. I was a director. I did not see all the reports to the Company. I don't think I ever saw the audit when Dyer left the company. I don't know that there was never over [184] \$42,000 paid into the Company. I was never told that. The Lucey Company furnished practically unlimited credit for the Company. I have no recollection of my son writing to me and advising me that he was writing to Lucey requesting payment of the capital into the North Texas Supply Company, or anything of that kind. I was advised that the Houston office was asking and requiring acceptances from the North Texas Supply Company for their goods. I did not write to Dyer that he should not give acceptances to the Lucey Company. I told Mr. Dyer not to give trade acceptances, except where orders have been filled and the money was due; that was the situation. The North Texas Supply Company probably owed the Lucey Company at all stages of the game \$100,000 or more, and it was falling due from time to time, and Mr. Dyer wrote me that the Lucey Company were insisting on trade acceptances on deals that were not due. That is what that refers to. I received a letter from Captain Lucey in

(Testimony of L. E. Doan.)

which he stated that the volume of business transacted was really more than what he should have done with his capital. I stated to Dyer on many occasions that he had neglected to serve me faithfully; that he did not organize two drilling companies; that he did not organize a rig-building company and that he traveled around, and that he had not taken and paid for the stock that he had subscribed for. I stated those things to Dyer at Fort Worth on January 21, 1920. I fix that date because Dyer gave me a check for \$3,000 in payment on the indebtedness that he owed me from the time that he left California. The check was paid, yes; I entered the memorandum in my book at the time that it was paid to me. That conversation was at Fort Worth. I made the entry in my book of the receipt of the check on that date; that is what I have to go by; that was with reference to the Santa Maria well. It was money that I had advanced for Dyer [185] on the Santa Maria well, a California proposition. He had never requested from me an opportunity to pay it before, or a statement from me, so that he could pay it. I demanded the money from him, but he had not offered it. At that time Dyer told me that he would pay the balance of the money, that he would send the rest of the money the next day, the following day; he said, "I have the money, and I will pay it the next day." He said, "I have already charged that \$6000 off in my income tax this year, this past year, and I will send you the money next

(Testimony of L. E. Doan.)

day, because I have already made up my mind to send it to you, because I have already charged it off."

I sent the telegram shown me.

(Telegram marked Plaintiff's Exhibit 51.)

Plaintiff's Exhibit No. 51.

(WESTERN UNION TELEGRAM.)

Ft. Worth Tex 156 PM May 5 1919.

B T. Dyer

Care American Hotel

Wichita Falls, Tex.

Close for Lamb piece if no objections the seven and half offered was southeast I would take that also Do not lose Lamb piece unless you have something better.

L. E. DOAN. 2 PM."

I also sent this telegram.

Document marked Plaintiff's Exhibit 52.

Plaintiff's Exhibit No. 52.

(WESTERN UNION TELEGRAM.)

"Ft Worth Tex 421 PM May 6 1919.

B T. Dyer

American Hotel

Wichita Falls, Tex.

Look up production for Terry Be sure identify party as [186] real owner our purchase.

L. E. DOAN. 431 PM."

(Testimony of L. E. Doan.)

The Terry referred to is Joe Terry. We referred to the Lamb tract. I also sent the following telegram:

Telegram marked Plaintiff's Exhibit 53.

Plaintiff's Exhibit No. 53.

(POSTAL TELEGRAM.)

P Shreveport La 1050 am May 15 1919.

B T. Dyer

c/o Ft Worth Club

Ft Worth Texas

Better go Burke tonight sell both pieces soon as possible also eastland acreage Can use money here better advantage Things looking fine Keep me fully posted by wire

L. E. DOAN 1141 am."

I also sent the following telegram:

Telegram marked Plaintiff's Exhibit 54, 1919, May 17 A. M. 441.

Plaintiff's Exhibit No. 54.

(WESTERN UNION TELEGRAM.)

"Shreveport La 16

B T. Dyer

Care Wigwam Tent Hotel

Wichita Falls, Tex.

Use your best judgment but sell Whatever you do will be satisfactory Also sell Burke piece We have goutht several pieces Will tell you details later this week Like best place to do business

(Testimony of L. E. Doan.)

Keep me posted Titus and I remain here until Sunday.

L. E. DOAN."

That applies to all the pieces of Burke-Burnett. The following, "Like best place to do business," means, I think, "Like Shreveport."

That telegram was sent by me to Dyer. It was sent before I told Dyer at Fort Worth that he would not be permitted to go into Louisiana. That conversation occurred at the time the North Texas was organized, which was almost the last day of May.

Telegram offered and marked Plaintiff's Exhibit 55.

Plaintiff's Exhibit No. 55.

(WESTERN UNION TELEGRAM.)

"Shreveport La 17

"919 May 18 AM 1 28.

B T. Dyer

Wigwam Tent Hotel

Wichita Falls, Tex. [187]

Better remain and make sale first opportunity
We have made bit purchases here wonderful prop-
erties and need the money Wire me tomorrow
before noon exact condition of neighbors well also
prospect of sale I go Ft Worth tomorrow night
Titus goes to Washington

L. E. DOAN."

(Testimony of L. E. Doan.)

The first sentence of that telegram applies to the Burke-Burnett property.

I sent a telegram to Dyer dated June 11, 1919. That was after the conversation at Fort Worth about the North Texas.

Telegram offered marked Plaintiff's Exhibit 56.

Plaintiff's Exhibit No. 56.

(WESTERN UNION TELEGRAM.)

"1919 Jun 11 AM 4 51

San Francisco Calif 10

B T. Dyer

Room Twenty Three North Western Railroad
Bldg Wichita Falls Tex.

Am leaving Thursday arriving Ft Worth Sunday
Leaving for Shreveport Sunday night Have arranged everything satisfactory Glad to hear good news You and Emery keep up good work and we will all make fortune Your friends all pleased to hear of good news.

L. E. DOAN."

I don't know what the good news referred to there, but probably Dyer had wired me that he was making progress with the North Texas, something like that. I don't remember Dyer having wired me that the Giffen well had landed at Shreveport.

The following telegram introduced and marked Plaintiff's Exhibit 57. [188]

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 57.

(WESTERN UNION TELEGRAM.)

MK Los Angeles Calif 1148 PM June 16 1919
North Texas Sup Co
Wichita Falls Tex

Have wired Carr today that unless he is prepared to make immediately deliveries to you I will not ask you to proceed with the completion of your organization Carr wanted this field covered and now that you are prepared to do so he must deliver you supplies even though he has to neglect his own stores.

J F LUCEY 849 P."

I don't remember that telegram; it was never sent to me that I know of.

Telegram introduced and marked Plaintiff's Exhibit 58.

Plaintiff's Exhibit No. 58.

(WESTERN UNION TELEGRAM.)

Shreveport La 1226 P Jun 17 1919
B T Dyer
Ft Worth Club
Ft Worth Texas

Giffen well completed Looks fine Hundred barrels Everything in all fields looks encouraging Will arrive Ft Worth Thursday

L E DOAN 138P."

(Testimony of L. E. Doan.)

That was after the conversation at Fort Worth.
“Q. That was after you had told Mr. Dyer that he would not be allowed nor permitted to go to Louisiana?” “A. Yes, I had told Mr. Dyer, if you will permit me, that I would carry him for an interest in Shreveport, provided he would carry out his contract in North Texas prior to this time.”

Telegram introduced and marked Plaintiff's Exhibit 59.

Plaintiff's Exhibit No. 59.

(WESTERN UNION TELEGRAM.)

“1919 Jun 21 PM 7 05

Houston Tex 5 P WQ [189]

B T Dyer

Wichita Tex Supply Co

Wichita Falls Tex.

Lucey arrives tonight Everything working out alright You will have everything within reach Going to Shreveport from here Monday to meet Titus Wire if you want anything

L E DOAN.”

Telegram introduced and marked Plaintiff's Exhibit 60.

Plaintiff's Exhibit No. 60.

(WESTERN UNION TELEGRAM.)

“Houston Tex 1144A 22 1919, June 22 P. M.

12:06

B T Dyer

Care North Tex Supply Co

Wichita Falls Tex

(Testimony of L. E. Doan.)

Have not been advised about well Have wired Raymond Will wire you soon as I hear Lucey here and everything is positively arranged about your material.

L E DOAN, Rice Hotel."

Raymond was a geologist residing in Shreveport. I cannot exactly recall what the telegram refers to.

Telegram introduced and marked Plaintiff's Exhibit 61.

Plaintiff's Exhibit No. 61.

(WESTERN UNION TELEGRAM.)

"Shreveport La 1038A June 24 1919

B T Dyer

Lucey Mfg Corp'n Ranger

That well came in big gasser No oil yet Dont look good I wrote you fully to Wichita Falls Will be here several days Wire about Five acre deal and eastland when you return

L E DOAN 1123A." [190]

I don't know what well I referred to in that telegram. It could not have been any well that we had. As to the five-acre deal referred to, that was the Lamb tract.

Telegram introduced and marked Plaintiff's Exhibit 62.

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 62.

(WESTERN UNION TELEGRAM.)

"Shreveport La 444 P June 25 1919.

B T Dyer

Ft Worth Club

Ft Worth Tex

Am offered on cars complete rotary outfit including engine and boiler grieve stem and fittings for ten thousand dollars Childs examined and says it is first class condition Wire or phone tonight if you can handle Titus Have bought eighty acres good stuff Forward my mail tonight.

L E DOAN 758 P."

That telegram means that Titus and I bought eighty acres down there at Shreveport.

Telegram marked Exhibit No. 63 introduced.

Plaintiff's Exhibit No. 63.

(WESTERN UNION TELEGRAM.)

"1919 Jul 7 AM 12 14

Shreveport La 6

B T Dyer

1014 Balboa Bldg

San Francisco Calif

(bbls) (had)

Giffin well pumping over hundred bones Hard cash offer twenty-five thousand for Bull Bayou forty We are putting up rig there Now also drilling second well on Giffin lease in morning My

(Testimony of L. E. Doan.)

desk take care all papers in drawers Everything fine here Regards Mrs Dyer.

L E DOAN." [191]

Telegram introduced and marked Plaintiff's Exhibit 64.

Plaintiff's Exhibit No. 64.

(WESTERN UNION TELEGRAM.)

"Jul 14 AM 3 10

Forth Worth Tex July 13

B T Dyer

1014 Balboa Bldg

San Francisco Calif

Simms did not show up Will be here tomorrow but I do not expect him to pay Stop Send my papers to Shreveport by express Stop Cannot verify report of well across river Stop Have instructed Leach to sell Stop Will instruct Daniels to sell Will drive car Shreveport tomorrow need it there Stop Martin Postal Building find out about Terry deal and wire me Emery here says everything fine at Wichita

L E DOAN."

The reference to Simms in that telegram means that we had a prospective deal for the sale of the five-acre piece to a man Simms and I had a date with him at Fort Worth and he did not show up. The reference to sending my papers to Shreveport by express refers to my office papers in San Francisco. The instructions to Leach refer to 80 acres

(Testimony of L. E. Doan.)

in Oklahoma. The car referred to was the automobile that Dyer and I purchased in Fort Worth. The Terry deal refers to the Considine-Martin Syndicate.

Telegram introduced and marked Plaintiff's Exhibit 65.

Plaintiff's Exhibit No. 65.

(WESTERN UNION TELEGRAM.)

"1919 Jul 8 PM 7 01

Shreveport La 18

B T Dyer

Palace Hotel

San Francisco Calif

Clark and Greer well on adjoining forty Bull Bayou flowing over thousand barrels from top of sand our ten inch casing cemented [192] today Stop Wire me all about Terry and Martin deal Are they going to put it over Stop Everything going fine here

L E DOAN."

The Clark and Greer well is the 40-acre tract that I purchased in Louisiana and upon which I made the first payment April 10, 1919. The Terry Martin deal refers to the Considine Martin Syndicate.

Telegram introduced and marked Plaintiff's Exhibit 66.

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 66.

(WESTERN UNION TELEGRAM.)

“1919 Jul 18 AM 3 16

Shreveport La 17

B T Dyer

Palace Hotel

San Francisco Calif

Carr not sore but says you are mistaken and wants you to go direct to Houston Stop Go St Francis Importation go get number of quarts and dates of each shipment to me They have shipped me less than half my order but have failed to send bills and express receipts They claim to have shipped all Stop Only two shipments of yours arrived Make them show items and dates of each shipment and if they cannot make good make them refund Drilling at Bull Bayou Big well just in near South East corner Pine Island Lease which absolutely proves all of it *Hop* Sims has not paid Claims he will but I have not faith Sorry to hear you are not well Come soon as possible The boys need you Going Houston tomorrow night return Monday

L. E. DOAN.”

I sent that telegram. The telegram should not read “*Hope* Sims has not paid” but should read “Stop Sims has not paid.” [193]

Telegram introduced and marked Plaintiff's Exhibit 67.

Plaintiff's Exhibit No. 67.

(WESTERN UNION TELEGRAM.)

"1919 Jul 28 A M 5 01

Shreveport La 27

B T Dyer

Cr Ft Worth Club

Ft Worth Tex

Be careful about talking to Martin about Terry deal See Terry and if you can help him raise any money do it The deal is closed but it is up to Terry and our end to raise more money otherwise Martin will have it all Stop Also see Sims and let me know about progress I will be here balance of week Everything going fine

L. E. DOAN."

Perry was the party interested in the Considine Martin deal.

Telegram introduced and marked Plaintiff's Exhibit 68.

Plaintiff's Exhibit No. 68.

(WESTERN UNION TELEGRAM.)

"1919 Aug 12 AM 1 41

Shreveport La 11

B T Dyer

Ft Worth Club

Ft Worth Tex

Have made arrangements to leave here tomorrow night Going to Southern Louisiana to look

over some leases Better postpone your trip to end of week so I can show you around Be sure and meet Sims Friday If he means business he will come through with a payment If you think advisable tell him to pay half cash and half out of oil That will make it easier for him Don't spring this however unless you think it necessary Better get in touch with him Thursday and ask him if he wants me there

L. E. DOAN."

[194]

Telegram introduced and marked Plaintiff's Exhibit 69.

Plaintiff's Exhibit No. 69.

(WESTERN UNION TELEGRAM.)

"1919 Aug 29 AM 11 32
Shreveport La 1054 A 29

B T Dyer

North Texas Sup Co

Wichita Falls Tex

McDevitt says our forty in Oklahoma is sure to come in Better stop sale at a low price until we have time to investigate Wish you would see Sims and have it out with him one way or the other Under all the circumstances do not think you should ask for check on your expense account If you need money better get it from your bank Wire me about Sims as I will need the money here for development work

L. E. DOAN."

(Testimony of L. E. Doan.)

The expense account referred to means some little expense that Dyer had been to and he asked me to pay him the cash and I told him he had better wait a little while. I told him to turn in a bill against the Doan Oil Company for the expense that he had incurred in regard to the acquiring of the Oklahoma property and the Burke-Burnett property.

Telegram introduced and marked Plaintiff's Exhibit 70.

Plaintiff's Exhibit No. 70.

(WESTERN UNION TELEGRAM.)

Shreveport La 1032 A Sept 22 19

B T Dyer

Care Ft Worth Club

Ft Worth Tex

Well will be drilled in tomorrow but heavy rains make it impossible to go Would like for you to come anyway Answer

L. E. DOAN."

Telegram introduced as follows: [195]

Plaintiff's Exhibit No. 71.

(WESTERN UNION TELEGRAM.)

"1919 Oct 7 AM 1 09

Shreveport La 6.

B T Dyer

Penna Hotel New York NY

Well has dropped to five hundred Barrels
Wired you care Lucey Did not way twenty three

pounds pipe if Pittsburg was going to ship other order

L. E. DOAN."

Plaintiff's Exhibit No. 72.

(WESTERN UNION TELEGRAM.)

Received at Ph Pennsylvania Hotel

"Shreveport La Oct 7 1919 1004 AM

B T Dyer

Penn Hotel Nyk

Pyrone insists on immediate drilling on Stephens county lease Better get in touch with him immediately

L. E. DOAN 1129 A."

Plaintiff's Exhibit No. 73.

(WESTERN UNION TELEGRAM.)

"Shreveport La Oct 11 1919

B J Dyer

Ft Worth Club

Ft Worth Tex

Better get me on phone or write fully about what you have in mind Stop No chance to do anything here Stop Better get your California organization together and put them in Pyron lease or something Stop Big well down to two hundred fifty barrels Stop Will take drill stem out next week and see if can bring it back Stop So much rain here that it is impossible to get anywhere or do anything

L. G. DOAN 810 P." [196]

Plaintiff's Exhibit No. 74.

(WESTERN UNION TELEGRAM.)

"1919 Dec 17 AM 4 32

Shreveport La Dec 16

B T Dyer

Penna Hotel New York NY

Tested number one Nelson well twenty seven hundred fifty six feet Plenty oil but not sufficient gas to flow Am drilling deeper Stop Number two pugh flowing three hundred barrels Other-wise nothing new

L. E. DOAN."

Letter introduced as Plaintiff's Exhibit 75.

Plaintiff's Exhibit No. 75.

(Letterhead B. T. DYER.)

"Feby. 10, 1919.

My dear Tom:

Am enclosing some letters. I took the liberty of opening two—from Canada. It seems that we are likely to receive some more payments a/c 7 Kora.

I hope to leave here next week. Expect Emery home this week, and will get everything cleaned up so I can go.

Titus will be here tomorrow, and I will have a further talk with him. I think he is the only one we can really count on, unless Lucey and Hover is ready to go.

Clarence Berry has been out of the City ever

since you left. I haven't any idea that he would go anyway.

I guess we will have to go to the bat ourselves, and when we find something good tie it up. I am sure Titus will finance anything after we get it and can say it is good.

When I get back we will get a machine and when we find something good, we will tie it up and then we can finance it. It may [197] take us a little longer and we will have to be a little more careful, but we will make more out of it. All these people out here think we are asking too much, so we will have to get it in a different way.

Find out about our leases, and close the deal—let me know about it.

I gave a letter of introduction to a Mr. J. C. Eskstrand to you. He represents the S. F. Chronicle and is going to Texas to write up the field. He told me today that he was in Dremble's office here a couple of days ago, and they told him that the boom in Texas was quieting down. Said that Dremble had so reported I hope he puts our deal over.

If Titus is still anxious to form a company I will try to get some others in, but if he is not anxious I will drop the matter until we have something lined up. The big strike in Seattle and Oakland have scared everybody. It looks like the Unions are getting ready to tie up everything in the U. S. The bankers here are all scared, and the outlook is not good.

(Testimony of L. E. Doan.)

I hope you will find everything looking good. Why don't you go down to Houston & Shreveport and get a lineup there before I arrive so we will know where it is best for us to dip in.

I will surely be ready to leave here sometime next week.

Sincerely yours,

DOAN."

The Titus referred to is the same who was on the witness-stand. The letter was written from San Francisco and I presume it was sent to Fort Worth. Dumble was the geologist for the Southern Pacific Company and associated with Paul Shoup.

Letter introduced as Plaintiff's Exhibit 76.
[198]

Plaintiff's Exhibit No. 76.

(Letterhead DOAN OIL COMPANY.)

"Shreveport, La., September 1st, 1919.

Mr. B. T. Dyer,
c/o Ft. Worth Club,
Ft. Worth, Texas.

My dear Tom:

I think you have made a good buy in taking the eighty acres in Stephens County. When Mr. Delaney was here he said that you had asked him to go in on the proposition. I told him that I thought it a good deal. I received a wire from him this morning that he had confirmed Alcott's report about the Hill Well, and he advised tying property up. I wired him this morning to get in

touch with you so you will probably hear from him. I hope the Alcott matter will be closed up within a few days, as I will need my personal money shortly. We are drilling three wells now, will start another one next week, and possibly two wells. Before these wells are completed with all equipment, tanks, standard rigs, etc., they will require an outlay of nearly one hundred thousand dollars. After they are completed I hope we will have production enough to take care of our future development so that we will not be in need of any more money.

I made a sale today of fifteen hundred acres of our Bull Bayou Wildeat for twelve thousand five hundred dollars. The parties purchasing will drill and prove it up for us. This will leave us over a thousand acres in the clear.

The Bull Bayou Well is going rather slowly on account of the strong gas pressure. They promise, however, to set the six inch pipe sometime this week, and it will be a matter of two weeks after that before the well is completed.

In all your letters and telegrams you have stated that you [199] were about to see Mr. Sims, but you do not say that you have ever seen him, or that he is doing anything whatever to bring the deal to a close. Please let me know what he is going to do. I am about convinced that he is simply stalling and has no idea of fulfilling his obligations. Everything is going along as usual.

With kindest personal regards,

Sincerely,

L. E. DOAN."

(Testimony of L. E. Doan.)

That letter was written by me. The first paragraph refer to an eighty-acre piece that Dyer told me he was figuring on buying for his California people. I told him to go and investigate it and find out if an oil well had brought in and if so it would be a good thing for the California Company. The next thing I heard from Dyer was that he had bought this property. After that he found out it was a water well instead of an oil well and Dyer was able to get out of the contract, for which he was congratulating himself. That is what Dyer told me at the time.

Letter introduced and marked Plaintiff's Exhibit 77.

Plaintiff's Exhibit No. 77.

(Letterhead DOAN OIL COMPANY.)

“Shreveport, La., September 16th, 1919.

Mr. B. T. Dyer,

c/o Ft. Worth Club,

Ft. Worth Texas.

Dear Tom:

I think it would be a good idea for Mr. Delaney to come over here as soon as he can. You can tell him that the Southwestern Gas Company have eight or ten thousand acres southwest of Homer, which proposition. There are a number of wells about to come in near portions of this land, and if Mr. they will turn over to me on some kind of a Delaney were here on the ground he might [200] he might pick up something good for your company.

You can tell him that I will do everything I can to put him in right.

I received your check for your balance on the Eastland Deal and it is satisfactory.

Wish you would see Walter Pyron and ask him if there is any dope across the river from Burkburnett, I hear rumors every day that wells are coming in.

I wrote you yesterday, we are held up for a day or two in finishing our weel on account of freight congestion. Will let you know as soon as we get going.

With kindest regards to Mrs. Dyer.

Sincerely,

L. E. DOAN."

LED/K.

The first paragraph refers to Dyer's \$50,000 California Company.

Letter introduced and marked Plaintiff's Exhibit 78.

Plaintiff's Exhibit No. 78.

(Letterhead DOAN OIL COMPANY.)

"Shreveport, La., September 20th, 1919.

Mr. B. T. Dyer,

% Ft. Worth Club,

Ft. Worth, Texas.

My dear Tom:

Your wire of the 19th received. When Jimmie comes to Shreveport tell him to look me up imme-

diately not only in regard to contract but in regard to selling rigs here. If you can get your orders filled for rotaries which Mr. Carr assured me he would do you can sell all of your surplus rotaries here and if you like you can get a bonus of five or ten per cent. Carr told me that this would be all right.

It is raining here to-day, and if it keeps up, I don't know whether we will be able to see our #1 Pugh well brought in or not, [201] however, will be glad to have you come over on your way to Houston. Cannot promise you any fancy hotel accommodations. Shreveport is very fast approaching the condition of Wichita Falls. Hotels are jammed and the people have gone crazy. If Delaney is going in with you in your new organization now is the time for him to be on the ground here, because there will be some great opportunities. Let me know by wire when you are coming.

Sincerely,

L. D. DOAN."

LED/K.

That refers to the same company. Delaney was to be connected with the California Crowd.

Letter introduced and marked Plaintiff's Exhibit 79.

Plaintiff's Exhibit No. 79.

(Letterhead DOAN OIL COMPANY.)

Shreveport, La., Oct. 25th, 1919.

My dear Tom.

I rec'd yours of 23d. I fully appreciate the difficulty in getting leases around the new well near Iowa Park. You must first be absolutely sure that there is no break about it. I am sure however you will find something. And I would not tackle a wild cat. The Lufkin County is wild cat. Raymond does not know any thing about it.

I have written Titus about the American Oil & Engineering Co. and a little later on after our wells on Section 6 are completed I may take it up with them. But I don't want you under any circumstances to mention it until we are ready to talk business, because I will have to go over the matter fully with Titus before I can offer anything.

Regarding the cancellation of your order with Carr. The only thing I have to say is to stand pat. I am through with taking [202] any of his bull. I will go to the bat with him any time. And I suggest that you keep on selling rigs wherever you can Shreveport or any other place. They have violated every agreement with the North Texas Supply Co. and you are at liberty to do as you please.

Bull Bayou will be as bad as Burke in 60 days. They are bringing in 5000 and 10000 live wells every few days, and no way of handling the oil.

Emery wrote me that he expected to come over for

(Testimony of L. E. Doan.)

a week end, but I have not heard further from him. I would like him to come on for two or three days, as he has never been here.

I hope you will be able to find something for your California crowd, but I realize that it is no easy thing to do. You will find something, however, and can soon build up a big company.

Things are at white heat over here but mostly lease speculators. Very few new companies are being formed. Olcott is here, and kind of gets on my nerves, keeps after me all the time. I think he has made some sales.

A well has come in across the river near some of the wild cat acreage in Bull Bayou—better than 200 bbl. I may sell some for from 100 to 200.

Sincerely yours,

DOAN."

The American Oil & Engineering Company referred to in that letter is the same company for which Dyer was working. I did not know that he was working for them at that time. Mr. Dyer had told me that the American Oil & Engineering Company might possibly be in the market for property, and I told him that I would take the matter up with them in due time, but he did not tell me at that [203] time he was working for the American Oil & Engineering Company.

Letter introduced as Plaintiff's Exhibit 80.

Plaintiff's Exhibit No. 80.

(Letterhead DOAN OIL COMPANY.)

Shreveport, La., Oct. 27.

My dear Tom:

I am leaving Wednesday for Washington. Had a wire from Titus this morning to meet him and Captain Lucey. We will discuss income tax and decide on whether it will be advisable to sell everything. I will only remain in Washington a couple of days and return here. Will let you know soon as I return what we decide on. We cannot offer anything until the wells on the 80 are completed which will be after Nov. 15th.

Our No. 1 Pugh well is down to 100 bbl. Completely sanded I think. We have been unable to complete the stand and rig on account of rain and mud. It rained 12 inches here in 10 days and completely stopped all work. We expect however to have it completed and the tools out of the hole within a week. And I hope the production will come back. I don't expect over 500 bbl, as the gas seems to have died out completely all around that part of the field.

As I wrote you yesterday, do not make any overtures to anybody about a sale of the property until you hear from me, as it might interfere with Titus plans. I don't know what his ideas are, but I think I have convinced him that we should sell some of our properties.

Rec'd the copies of your letters to Carr & Young.

I don't suppose that they will have the nerve to try to hold you up. If they do tell them you will not stand for it. I am thoroughly disgusted with Carr, and if he makes any bad breaks, I will go straight to Lucey, and in such a way that he will take notice. [204]

I will be in Washington probably Friday & Saturday, and will return here immediately.

Sincerely yours,

DOAN."

That letter was written by me.

Copy of letter from Dyer to Doan introduced and marked Plaintiff's Exhibit 81.

Plaintiff's Exhibit No. 81.

"Oct. 1st, 1919.

"Mr. L. E. Doan,
Merchants Bldg.
Shreveport, La.

Dear Leonard:

The Pittsburgh office have arranged for five (5) carloads of 6" Drill Pipe for you—1 carload of which will start in Sept., and another carload each month thereafter.

Mr. Clarke and Mr. Hoover, and the Purchasing Department here are trying to get better deliveries on this at the present time. New orders that are given are not promised inside of six to nine months. So far to-day, we have been unable to find any pipe that can be delivered immediately. We are still hunting.

Mr. Hoover has just returned from New York and advises me strongly that I should take a couple of days to go there and see Mr. Meredith, as his plan was something that apparently is big, so I am going to leave for New York to-night, as I have received three telegrams here from Mr. Meredith, urging him to be there Thursday at a meeting.

I have had a splendid talk with Mr. Hoover and I am sure if there is any opportunity of getting things straightened out in Texas, he is going to insist on our deliveries. He is going to talk this up with Captain Lucey, personally.

While I was in Chattanooga, I arranged with the Southern [205] Engine & Boiler works to get 28 boilers, which will be delivered on a promise scattered over a period of three weeks, and they have reduced the price \$100.00 to meet me on my demand.

Taking everything into consideration, the best thing I can do is to accept these, as it will give us a rebate of \$100.00 per boiler, and get us immediate deliveries on the balance of our original order, and I am shipping four (4) carloads to Shreveport and three (3) to Wichita Falls. I feel that I made about \$28000.00 by coming to Tennessee, in addition to getting better deliveries.

I am just advised by Mr. Clarke, in reply to your telegram of the 30th, that they will be able to get a good portion of your 6" Pipe, rolling the latter part of Oct., and he wishes you to advise me how much of the entire shipment you wish to start this month,

(Testimony of L. E. Doan.)

as it may be possible he can get three (3) carloads, or more, shipped in October, and possibly all.

I do not want you to think that I am neglecting anything in Texas, as my trip so far has been exceptionally beneficial for, not only the Supply Company, but for us personally, and I will be back in Texas early next week, and I will send Mrs. Dyer direct to California from New York.

My visit here has put me close in touch with Mr. Clarke and Mr. Hoover, and while at Chattanooga I got some results from Mr. Young and am promised better deliveries from now on.

I will be in New York Thursday and Friday, and it is quite possible Mr. Hoover will come on to New York to-morrow to meet me there. Mr. Hoover sends best regards.

Very truly yours,

B. T. DYER."

BTD:G. [206]

I remember receiving that letter. Introduction of letter objected to by defendant as being a self-serving declaration.

Objection overruled. Exception noted.

In our Shreveport operations, I had placed an order with the Lucey Company for a large amount of casing to be used in Shreveport, and Mr. Dyer was in that county at that time, although I had protested against his going back there, but as long as he was there, on account of his connection with the North Texas Supply Company, handling oil well supplies, I wired him to see Mr. Hoover, and see

(Testimony of L. E. Doan.)

if he could not rush this pipe. That is all. It is on account of his connection with the North Texas Supply Company. It has no connection between Mr. Dyer and myself, but as long as he was president and manager of the North Texas Supply Company, I thought he might assist in getting that pipe. It was after Titus went to Shreveport and after I paid the \$30,000 on the Lamb tract that I learned the offset well was in water and not in oil.

Letter introduced and marked Plaintiff's Exhibit 82.

Plaintiff's Exhibit No. 82.

(Letterhead THE FORT WORTH CLUB.)

"Fort Worth, Texas, Jan. 10.

Dear Larry.

When I packed the office things I did so with care and according to your instructions, taking each drawer and placing it in the box and separating each lot with plain paper. I don't know the Santa Maria books at all. I have some recollection about something you mentioned not to send to keep with our things and if there is another box it is with my boxes in Bekins storage at San Francisco. [207]

I have wired Miss Lawton to go through the few boxes I have in storage, which are in a private room, and if it is there it will be expressed to you.

Very truly,

B. T. DYER."

I think there is a box in storage there, if my memory is correct. The oil well in the N. W. $\frac{1}{4}$

Sec. 28-4-14 in Oklahoma that we were watching, and which lies nearly two miles east the 36 acres, is down and reported dry. Opinion is the pool goes more to the west—even more so than the 36 acres. Yesterday at Wichita Falls I had a half way offer of 250.00 for our piece—talked with Couch and wired the party to-day we would take 330.00 and allow him 10%. Hope this is O. K. with you. If not advise.

DYER.”

Telegram introduced and marked Plaintiff's Exhibit 83.

Plaintiff's Exhibit No. 83.

(WESTERN UNION TELEGRAM.)

“WA Washington DC 1104AM June 2 1919.

L. E. Doan,

Care Ft. Worth Club,

Ft. Worth, Texas.

Am very glad to have Lucey subscribe Fifty thousand dollars His first twenty-five thousand dollars must be in your hands in Shreveport in time for fifty thousand payment on Pine Island property stock I will subscribe ten thousand to his Supply Company but should not be called on for this until we have paid for our Pine Island lease Stop With Midfield well in draining our property we should either sell or make arrangements to drill well at once Stop Is it not feasible to organize company on usual basis and sell enough stock to at

(Testimony of L. E. Doan.)

least drill well taking chances on disposing of our remaining stock later Will arrange to meet you in Shreveport about fifteenth or sixteenth Stop I approve new leases you are getting near Shreveport but have doubts about taking on proposition [208] from ?om Gulf Company concerning one hundred sixty aced

LOUIS TITUS. 123 PM''

I do not know whether that telegram was in response to a telegram or letter. I put it up to Titus about a 160-acre proposition that the Gulf Company had offered and he did not approve of it. That was in Stephens County in deep territory. I told Dyer that I was through with Texas; that was the latter part of May or first of June when we organized that North Texas Company. This proposition had been put up to Titus that it looked good, with a big well close to it. I was not enthusiastic; I merely put it up to Titus; if I had told him to take it he would have taken it. He would have gone into any proposition practically that I recommended, but I simply made a suggestion to him and he replied as you say there.

At the conversation on January 21, between Dyer and myself we both got very angry. After that time I took the matter up with Dyer again and he took it up with me. Some two or three weeks later he came to Shreveport. That is when we had the big dispute at Shreveport; on a Sunday morning he came into the hotel when I was eating breakfast, and he came in and sat down. I said, "What are

(Testimony of L. E. Doan.)

you doing over here?" And he said, "I have a proposition of 40 acres over in Oklahoma, and I want to borrow \$40,000 on our Doan Oil Stock." Well, it was such a ridiculous proposition, because he did not have any oil stock, he had never paid for any Doan Oil stock. Even on the compromise proposition I had offered him on January 21st he did not own the stock, because it had not been paid for, and yet he comes over and wants to borrow \$40,000 on stock that he did not own or did not control; so we got *over* a dispute over the thing there, [209] and we passed some very angry words, which I regretted very much, and apologized to Mr. Dyer afterwards for the language I used.

The \$3000 check above referred to was offered in evidence and marked Plaintiff's Exhibit 84.

Plaintiff's Exhibit No. 84.

(CHECK.)

Fort Worth, Texas, Dec. 29, 1919. No. 124.

The First National Bank of Fort Worth.

Pay to L. E. Doan or order \$3000.00 Three and no/100 Dollars.

B. T. DYER.

1 Santa Marie Well.

(Endorsed:) "L. E. Doan." "Received Payment Through Clearing House Jan. 23, 1920, National Bank of Commerce, Fort Worth, Texas." "Pay to the order of any bank, trust or express company 82-2 Jan. 21, 1920. 84-2 All Prior En-

(Testimony of L. E. Doan.)

dorsements Guaranteed First National Bank,
Shreveport, La.”

I am not positive whether I had any further conversation with Mr. Dyer until I met him in San Francisco in April. I might have seen him later on in Fort Worth, I don't know. It is my recollection that I went to Fort Worth within a few days after that, and had a further talk with Tom Dyer. I went over the whole proposition with him again, and I said, “Tom, you have absolutely failed in every respect to do any of the things that you agreed to do, and I do not think that you are entitled to anything, whatever.” I said, “in the first place, you agreed with Captain Lucey to go up there and take charge of the North Texas Supply Company, and carry out all of those agreements that you made with him, then you made a separate agreement with me to do those things and you have absolutely failed to do all of those things, and then we made this compromise agreement on January 21, you promised to send me the money the next day and you did not send it, and [210] I think you are out entirely. I do not think you are entitled to anything.” “Now,” I says, “I will tell you what I will do. I may be wrong about this thing, it is possible, I do not want to do you an injury, I never wanted to do injury to anybody in my life, you state your case to Captain Lucey and Louis Titus, and I will do the same thing, and I will tell them to give you the best of it, and if you are entitled to anything I will tell them to give you the

(Testimony of L. E. Doan.)

best of it, because I want you to get everything that you are entitled to." That was the conversation I had with him, a few days afterwards, and I repeated that same offer to him again in San Francisco, along in April, before the suit was started. I think we had a conversation at Fort Worth and I repeated the same conversation again at the Palace Hotel in San Francisco.

Letter introduced and marked Plaintiff's Exhibit 85.

Plaintiff's Exhibit No. 85.

(Letterhead DOAN OIL COMPANY.)

"Shreveport, La., May 12, 1920.

Mr. C. B. Colby, Pres.,

North Texas Supply Company,

Wichita Falls, Texas.

My dear Colby:—

Replying to yours of the 10th from Fort Worth, beg to say that while in California I spent three or four days with Captain Lucey and discussed with him the North Texas Supply Company's situation. I told him that I understood that you had made a call for the balance of the subscription, and he said that he did not understand that you would make a call until a little later. However, I am in full sympathy with anything that Captain Lucey wants and desire to co-operate with him in every particular, but, of course, I cannot speak for others. At this time I desire to call your attention to the alleged agreement to pay Ten Thousand

Shares [211] to Mr. Dyer. I discussed this matter with Captain Lucey, and he is of the same opinion, that I am, that Mr. Dyer did not earn this compensation, in fact he did not earn his salary. He did not carry out his agreement to remain in Wichita Falls and do all the things that were originally planned. I, therefore, at this time on behalf of Louis Titus, whose stock has been turned over to me, S. S. Raymond and my son, protest against the payment of this Ten Thousand Shares to Mr. Dyer and will hold the directors and stockholders of the North Texas Supply Company responsible if they do pay it.

· Mr. Titus only went into the North Texas Supply Company at the request of Captain Lucey and myself, and it was understood that the Lucey Company would take over the stock of the North Texas Supply Company at book value at any time. He has requested me to dispose of his stock to the best advantage, possibly you may know of someone who would like to take it over: also S. S. Raymond's stock and my son's stock. Probably some of the boys in the Lucey Company would like.

While I am perfectly agreeable to turn over to you Captain Lucey's certificate for Ten Thousand Shares, and while I do not doubt your good faith in the matter, I would like a letter from Captain Lucey requesting me to make the assignment when I will immediately turn it over to you.

Possibly if you would write a letter to all of the stockholders of the North Texas Supply Com-

pany, setting forth fully in detail the exact situation and give them an opportunity to vote on the matter at a meeting, they might all be induced to come thru with the balance of this subscription. I never had any notice of any meeting called for the purpose or even discussing the matter of calling payment of the balance of the stock subscription. It [212] seems to me that the proper thing to do would be to postpone this matter until it can be done regularly, and after due notice to all stockholders and directors.

I am writing Captain Lucey to-day in regard to the transfer of Ten Thousand Shares of stock, as soon as I hear from him I will take the matter up with you. If it is Captain Lucey's desire that all the things mentioned in your letter be carried thru, I will co-operate with you fully with the exception of the payment of Ten Thousand Shares to Mr. Dyer, which I will protest as long as I have an interest in the North Texas Supply Company. I am mailing Captain Lucey a copy of this letter.

With kindest personal regards, I remain

Very truly yours,

L. E. DOAN."

LED/K

cc—Captain Lucey.

(Rubber stamp:) "North Texas Supply Co., received May 17, 1920. Graham, Texas."

Telegram introduced and marked Plaintiff's Exhibit No. 86.

(Testimony of L. E. Doan.)

Plaintiff's Exhibit No. 86.

(WESTERN UNION TELEGRAM.)

"A21DA 58 NL

"1920 Mar 22 AM 2 47

Shreveport La 21

2893

B. F. Dyer

Care American Oil and Eng Co 910 Dan Waggoner Bldg Ft Worth Tex

I am very sorry for the harsh words I used in our argument today and I sincerely apologize It was all said in the heat of argument and I sincerely regret it I will be in Ft Worth Monday next for the automobile trial I will write you tomorrow a proposition which I trust will meet with your approval

L. E. DOAN" [213]

I testified in a deposition taken in this case before it was transferred to the Federal Court that Dyer was to make the investment in the North Texas Supply Company and that he was to divide the stock with me and that I was to get half the bonus stock. I also testified in that deposition further back that we were discussing the settlement that was made on the 21st day of January. I never made that statement until after that talk Mr. Dyer and I had on the 21st day of January, and this statement was made in connection with that. I refer to my testimony where I stated that I told Mr. Dyer the thing was all off, absolutely off, be-

(Testimony of L. E. Doan.)

cause he had absolutely failed in the first place to carry out his contract and that the proposition I made was simply a compromise proposition at the time.

Part of said deposition was offered in evidence, and in narrative form is as follows:

“As a compromise matter I told Dyer that if he would pay me back all his back indebtedness—I needed some money at the time—and carry out his agreement with the North Texas Supply Company, that I would carry him providing—for a certain number of shares of stock, if he would discount it 25%, I would carry him for it; but I afterwards withdrew that proposition, because he had not sent me the money he agreed to send me. I had to go and borrow some money right away. That was simply a compromise proposition. It was made at Fort Worth. Nobody was present but Dyer and myself. He was going to give me all he owed me—six or eight thousand dollars in cash, and was going to give a dollar a share for the stock (Doan Oil Company stock) and to have half of the stock that he got in the North Texas Supply Company; half of the stock that he agreed to take—and whatever other profits he might make. That conversation was several months ago. I waited [214] about thirty days before I withdrew it, to give him a chance to raise the money; he did not do it and I withdrew it. I had another conversation with him and told him the thing was all off, absolutely off, because he had absolutely failed in the

(Testimony of L. E. Doan.)

first place to carry out his contract. The proposition I made was simply a compromise proposition at the time.

Q. This North Texas Supply Company was capitalized for how much? A. 100,000 shares.

Q. How much was paid in?

A. 50,000. I subscribed for 10,000 shares for my son.

Q. And were you to divide the stock with Mr. Dyer? A. Not my son's stock, no sir.

Q. With Mr. Dyer's stock, were you and he to make that investment in partnership?

A. He was to make the investment.

Q. Was he to divide the stock with you?

A. Yes, sir.

Q. Were you to get half the bonus stock?

A. Yes.

Q. And all the money that you actually put in the North Texas Supply Company was about \$5,000 for your son, wasn't it?

A. Yes. At the time I first started the Doan Oil Company I suppose I had fifteen or twenty thousand dollars invested in Louisiana in that company. I kept on with advances until I had put about \$110,000 in it. I told Dyer that provided he kept his contract in Wichita Falls and paid me what money he owed me I would carry him along in the Doan Oil Company and he need not raise the money himself, he to give me a quarter. I never had any other conversation with him, although that was a thousand times more than

(Testimony of L. E. Doan.)

he was entitled to. It was a compromise matter rather than have any trouble with Dyer; I told him I would do that. I have been friendly with him a good many years and have known him ever since he went to Bakersfield about 1905. I have always found him to be square and honest. As to this being the first time that I ever had a jar with him, I have very frequently talked to Dyer about his habits,—methods [215] of doing things; Dyer is a very impulsive fellow, you know, and tries to do a good many things which are not according to Hoyle; and I have jumped on him pretty strong a good many times about that and told him that he lost caste,—he lost his credit by reason of his habits. I went down to Anglo Bank and got credit for him, and I went to the Central Bank in Oakland, so that he could borrow money whenever he wanted,—out of pure friendship for him, I have loaned him money whenever he wanted, as much as ten, or twelve thousand dollars. I did that many times. There has not been a time in several years when Dyer has not owed me a lot of money."

There was no secret about the purchase of the property in Louisiana. The Giffen well and the Greer tract were purchased about the 10th of April and went to the Doan Oil Company. The Lamb tract also went into the Doan Oil Company, also the Couch tract in Oklahoma. I held the Lamb tract in trust for the Doan Oil Company for con-

venience in making transfers. I did that at the suggestion of Titus.

Telegram introduced as Plaintiff's Exhibit 87.

"Plaintiff's Exhibit No. 87

(WESTERN UNION TELEGRAM.)

1920 Dec 2 P M 3 27

"A365D 11 Collect

Wichita Falls Tex 417 P 2

B T Dyer

C 059

Care W H Matson Balboa Bldg San Francisco Calif

No transfer to leasehold since one to L E Doan

KAY AKIN and KENLEY

In regard to the automobile, that was in litigation. I told Dyer that as soon as it was settled we would adjust that matter. It was in litigation at the time I told him to put in that expense account, I never told him to put that automobile in. [216] I never allowed the expense account. That is a matter between Dyer and myself. It never went into the Doan Oil Company. I told him to render an account of the expenses he had incurred in regard to the purchase of the Lamb and Oklahoma tracts. The only protest I made at the time was shortage of money. Afterwards, I took over the proceeds of the automobile litigation and gave Dyer credit for half on his personal indebtedness. I turned the proceeds into the Doan Oil Company. Dyer owed me on money that I advanced him before he left California. At that time he did not

owe me anything except advances to the Santa Maria wells.

Letter introduced as Plaintiff's Exhibit No. 88.

Plaintiff's Exhibit No. 88

(Letterhead DOAN OIL COMPANY.)

“Shreveport, La., Sept. 22, 1920.

Mr. B. T. Dyer,

c/o American Oil & Engineering Co.

Dan Waggoner Bldg.

Fort Worth, Texas.

Dear Sir:—

I am enclosing you herewith final statement of the Doan Syndicate at Santa Maria. In order to close this transaction I sent the Lucey Manufacturing Corporation my check for \$3,490.33. It will appear from the statement that they over-subscribed. In addition to the \$6,000.00 advanced by me for you there would be due an additional sum of \$443.47, together with interest at 6%.

Very truly yours,

L. E. DOAN.”

Encl.

LED-u.

Mr. Doan:—

You should remit Lucey Manufacturing Corporation \$3,490.33, and I have made an entry in the Journal of the L. E. Doan Syndicate [217] books giving you credit for this amount:—

Lucey Manufacturing Corp.

Cash Investment\$54,750.00

Supply Account 21,507.67

 Total 76,257.67

Applied as purchase price of one-half in-

terest in property 40,000.00

 Balance 36,357.67

Charged up with one-half of operating

loss as per statement 32,767.34

 Difference due Lucey Mfg. Corp.\$ 3,490.33

(Letterhead WINSTON, MAGUIRE and
PEARSON.)

Shreveport, La., September 15th, 1920.

L. E. Doan, Esq.,

Merchants Building,

Shreveport Louisiana.

Dear Sir:—

In compliance with your instructions to bring the books of the L. E. Doan Syndicate up to date, and prepare a statement therefrom, in view of the fact all the assets have been sold, and the business is now ready for liquidation, we beg leave to submit this our report, together with the accompanying exhibits.

The L. E. Doan Syndicate is composed of Lucey Manufacturing Corporation, which has a one-half interest therein, for which it agreed to pay \$10,000.

cash, and advance \$30,000 worth of supplies. The other one-half is divided equally between L. E. Doan, J. F. Carlston, B. T. Dyer, H. Fleishhacker, and A. Strassberger, who each invested \$6,000 cash. The Lucy Manufacturing Corporation was bound further to make an equal investment of \$30,000.00 to maintain its one-half interest.

Exhibit "A" Trial Balance, September 15, 1920.

Exhibit "B" Statement of Operations. [218]

Exhibit "C" Balance Sheet, September 15, 1920.

Respectfully submitted,

WINSTON, MAGUIRE and PEARSON.

By J. B. MAGUIRE.

(Letterhead WINSTON, MAGUIRE and
PEARSON.)

L. E. DOAN SYNDICATE.

EXHIBIT "A."

TRIAL BALANCE

September 15th, 1920

	Debits	Credits
Automobile Expense	\$ 3,169.74	
Commissary	4,710.89	
Construction Labor	3,310.00	
J. F. Carlston—Investment ..		\$ 6,000.00
Drilling Supplies & Equip- ment	46,859.03	11,021.92
Drilling Expense	21,835.28	
L. E. Doan—Investment		6,000.00
L. E. Doan		2,767.34
B. T. Dyer—Investment		6,000.00

Expense	\$ 1,472.86	
Freight and Drayage	10,395.29	
H. Fleishhacker—Investment		6,000.00
Gas, Water and Oil	12,775.81	
Insurance	660.74	
Lucy Manufacturing Corporation		54,750.00
Lucy Manufacturing Corp.—Supplies		18,017.34
Lease Account	10,000.00	
Over and Short—Cash		61.85
Salary—L. E. Doan, Jr.	1,332.45	
A. Strassberger—Investment		6,000.00
Taxes	96.36	
	<hr/>	<hr/>
	\$116,618.45	\$116,618.45
	<hr/>	<hr/>

[219]

(Letterhead WINSTON, MAGUIRE and
PEARSON.)

L. E. DOAN SYNDICATE.

EXHIBIT "B."

OPERATING STATEMENT

September 15th, 1920

Drilling Supplies & Equipment	\$46,859.03	
Sale Price of Salvage	11,021.92	
	<hr/>	
Net Loss	\$ 35,837.11	
Automobile Expense	3,169.74	
Commissary	4,710.89	

Construction Labor	3,310.00
Drilling Expense	21,835.28
Expense	1,472.86
Freight and Drayage	10,395.29
Gas, Water and Oil	12,775.81
Insurance	660.74
Lease	10,000.00
Salary—L. E. Doan, Jr.	1,332.45
Taxes	96.36

Total Disbursements:\$105,596.53

Less Credit:—

Cash Over & Short, Santa Maria Bank

Balance 61.85

Loss:\$105,534.68

Less:

Amount paid by Lucy Manufacturing

Corporation, for one-half interest in

property 40,000.00

Net Loss From Operating\$ 65,534.68

Net loss from operating distributed as [220] fol-
lows:

Lucy Mfg. Corporation	1/2	\$32,767.34	
L. E. Doan	1/10	6,553.47	
J. F. Carlson	1/10	6,553.47	
B. T. Dyer	1/10	6,553.47	
H. Fleishhacker	1/10	6,553.47	
A. Strassberger	1/10	6,553.46	\$65,534.68

(Letterhead WINSTON, MAGUIRE and PEAR-
SON.)

L. E. DOAN SYNDICATE.

EXHIBIT "C."

BALANCE SHEET

September 15th, 1920.

ASSETS.

Lucy Manufacturing Corpora- tion	\$54,750.00
Supply Account.....	18,017.34
Total Investment Lucy Manufacturing Corporation	\$72,767.34
Payment for one-half interest in prop- erty	40,000.00

Balance to credit for development.....\$32,767.34

Debit—One-half entire loss operating...\$32,767.34

Balance due Lucy Mfg. Corpn.... NONE

J. F. Carlston—investment...\$.

Debit—one-tenth entire

loss 6,553.47

Credit—Original invest-

ment 6,000.00

Balance due L. E. Doan Syndicate....\$ 553.47

B. T. Dyer—Investment

Debit—One-tenth entire

loss \$6,553.47

Credit—Original Invest-

ment 6,000.00

Balance due L. E. Doan Syndicate.. 553.47

H. Fleischhacker—Investment		
Debit—One-tenth entire		
loss	\$ 6,553.47	
Credit—Original invest-..		
ment	6,000.00	553.47
Balance due L. E. Doan Syndicate		
A. Strassberger—Investment		
Debit—One-tenth entire		
[221] loss.....	\$ 6,553.46	
Credit—Original invest-		
ment	6,000.00	
Balance due L. E. Doan Syndicate..	\$	553.46
<hr/>		
TOTAL	\$	2,213.87
<hr/>		

LIABILITIES.

L. E. Doan—Investment Ac-		
count	\$ 6,000.00	
—Open Account.....	2,767.34	
	8,767.34	
<hr/>		
Debit—One-tenth entire loss..	6,553.47	\$2,213.87

(Letterhead DOAN OIL COMPANY.)

Shreveport, La., Oct. 16th, 1920.

Mr. D. T. Dyer,

512-513 Dan Waggoner Bldg.,

Fort Worth, Texas.

Dear Sir:

Replying to yours of the 11th; you evidently misunderstood me in regard to the Santa Maria books. I have all the books which McLane wrote up for me and they include everything except a portion of the sale of material made by Woods

and Hausen. I brought the books from San Francisco before the office was closed and left the vouchers and some of the old check books.

The statement rendered by Mr. Maguire and Pearson is absolutely correct.

Yours very truly,

L. E. DOAN.

LED-u [222]

The above letter shows that Dyer owed me some \$3490. This letter was written September 22, 1920. On January 21, Dyer paid me \$3000, you know, and that cut his \$6000 indebtedness down.

Redirect Examination.

With reference to telegram dated July 14, and marked Plaintiff's Exhibit 64, and referring to the last portion about the Terry deal, that related to the Considine-Martin deal. The way I got into the Considine-Martin Oil Co. was this, Mr. Terry, and Mr. Martin, and Mr. Howard, and a few other individuals in Fort Worth had secured an option on a piece of property; I did not know anything about it, had made no investigation of it at all, did not care anything about it, but Joe Terry, an old friend of mine, whom I had known for many years, came to me and said, "Doan, I have got a chance to get in on this deal; we have got to put up \$10,000 for this option, and I have not got the money; would you let me have the money?" I said, "How much money do you want?" He said, "I want \$2,666.66. I said, "Joe, sure I will let you

(Testimony of L. E. Doan.)

have the money.” And so I gave him \$2,666.66, which secured for him a certain interest in that option. Joe said to me, “If I get anything out of this I will split with you on it.” I loaned him the money as an old friend, [223] just to help him along. Later on, from that option which organized a syndicate—the \$10,000 option was only a small item; they had to pay something like a couple of hundred thousand dollars later on to secure this property, and in order to do that each one of these parties who went in on that original option deal had to sell so many units to make up this \$200,000; they had to go out and promote a company in order to raise this \$200,000. Mr. Terry had a certain amount of money allotted to him that he had to raise, so I thought probably Mr. Dyer might be able to help him raise that money, and I wired Mr. Dyer to go and see how Terry was getting along, and to give him help to sell some of these units. Mr. Dyer never took any interest in the matter, and never sold a unit. Joe Terry sold the full allotment of units that were sold, every one of these. That was the way I secured my interest in the Considine-Martin deal. I gave Terry a check for \$2667.

Check introduced as Defendant’s Exhibit “G.”

This check dated May 22, 1919, signed by L. E. Doan in favor of J. Terry for \$2667.00.

I never made the following statement, testified to by Dyer with reference to the formation of the Doan Oil Company: “We have arranged to make

(Testimony of L. E. Doan.)

a \$300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece." I did not have the conversation with Dyer and he did not say the things to me which he testified to concerning the conversation about Wynn Meredith, concerning Dyer getting a salary from American Oil & Engineering Company and my getting a salary from the Doan Oil Company and each keeping our own salary.

Recross-examination.

With reference to Joe Terry, I got 15,000 shares in that concern; that was what I got out of it: Terry got 15,000 shares [224] also. I did not tell Dyer to make a note of it when I put up the money. I did not tell him I was carrying Joe Terry there and helping him out on any joint account. I think Joe Terry is in the East somewhere. He is in Kentucky.

Carlson and Fleishhacker were in the Santa Marie well with others. I sent them statements at the same time I sent Dyer the statement September 22, 1920; their amounts were \$6500 apiece. They had already paid \$6,000, and there was, therefore \$500 more due from them.

Deposition of A. J. Carr, Offered in Evidence on Behalf of Defendant.

My name is Arthur James Carr. I live in Houston, Texas, and have lived there since 1914; am now engaged as Vice-President and General Manager of the Lucey Manufacturing Corporation of

(Deposition of A. J. Carr.)

Texas. I have held that position since March, 1915. I have known Dyer approximately eight years. I have known Doan approximately eight years. I know J. F. Lucey; he is the President of the company for which I work and resides in New York. The Lucey Manufacturing Company is engaged in the manufacture of oil well drilling machinery and its sale. It is a large company, engaged in business all over the world. I am interested in the North Texas Supply Company and own \$2,000 worth of stock. It was organized in the former part of June, 1919. I was present when this company was first organized. The discussion as to its organization took place at Fort Worth Club, Fort Worth, Texas. The organizers were Mr. Lucey, Mr. Doan, Sr., and Mr. Dyer; no one else. I was not present at all the conferences; I was present at the preliminary conferences and after it was organized I went to Wichita Falls. I was present with Dyer, Doan and Lucey in the preliminary arrangements in which their connection with the company was discussed. I was present at several preliminary conversations with reference to its organization in which Dyer [225] and Doan were present, and I think Captain Lucey was present at all those, too. The substance of the conversations in which Dyer and Doan present in reference to the organization of the Company is as follows: When the subject first came up in regard to organizing the North Texas Supply Company at Wichita Falls, Capt. Lucey first

(Deposition of A. J. Carr.)

brought the matter up, and decided, on account of the large amount of business there was to be had in that territory, that we should go in there or have some representative in there to sell our manufactured products and the best way to do that would be by organizing a subsidiary—not a subsidiary company but another company. He interested Mr. Doan and Mr. Dyer, and he said he would do it with the understanding that Mr. Dyer was to go to Wichita Falls and take charge of the business and become President of the company and manage the business, and with that understanding why they agreed to go ahead. They agreed to go ahead and organize the company. Mr. Dyer was to be President and General Manager. In regard to stock subscriptions of the company, to the best of my recollection and knowledge Capt. Lucey agreed to start the company off with ten thousand dollar subscription, and in fact gave his check for ten thousand dollars right then to start the company off with, and Mr. Doan agreed to take ten thousand dollars worth of stock and Mr. Dyer agreed to take ten thousand dollars worth of stock. There was a stock bonus consideration. To the best of my recollection the proposition was, that Dyer was to be given a ten thousand dollar stock bonus at the end of the year, provided the company had made one hundred thousand dollars worth of profits, as a part of his compensation, but that was to be over and above the original ten thousand dollar subscription. Dyer was to receive

(Deposition of A. J. Carr.)

\$500 a month salary and expenses. The understanding, or rather [226] the arrangement was made that Mr. Dyer was to go to Wichita Falls and not only manage this company but form a company or drilling contracting companies, and possibly a rig building company, and that he might do anything else up there that did not interfere with the business in that territory. He was to devote all of his time to those particular things that they agreed upon, that I mentioned above there, in that particular territory. He was to organize a contracting drilling company and possibly a rig-building company. He could look the situation over and if he thought it was a profitable thing to do as far as the rig-building company was concerned. The North Texas Company was finally organized and had commenced business. Dyer became president and remained so until the early part of this year. He left approximately in March or April. As far as I know he left by his own accord. While Dyer was engaged I had occasion to do business with the Company by which I could ascertain whether he was in Wichita Falls any length of time. On very numerous occasions I couldn't get in touch with Mr. Dyer, and other occasions I did. There were a great many times I called up over long distance phone and sent telegrams and one thing and another and they advised me that Mr. Dyer was away. I met Dyer in Fort Worth on a great many occasions. Dyer subscribed for ten shares of the company. I don't

(Deposition of A. J. Carr.)

know whether he ever paid for that stock or not. I don't know how much he owns now. He subscribed or agreed to subscribe for \$10,000 originally. He agreed to take that much in the preliminary organization. The value was \$1.00 per share. As a part consideration and as an inducement for him to go over there and go into this business they agreed to see that Mr. Dyer received a bonus of ten thousand dollars worth of stock at the end of twelve months, providing the company had [227] made a profit of one hundred thousand dollars. I don't believe the Company made \$100,000 within the twelve months. As to these subsidiary companies that it was agreed Dyer was to organize, only one was organized to my knowledge. That was a drilling company. It is not doing business. I don't know how long it was in business or did business. The trade and business conditions and the supply business during the year 1919 at Wichita Falls were the best of any district I have ever known. There was a greater demand for rotary drilling equipment. The rig-building business was excellent. In fact, all oil well business was excellent.

Cross-examination.

I don't recall how many preliminary conferences at Fort Worth I attended. Mr. Doan and Mr. Dyer and Capt. Lucey and myself all roomed on the same floor, and we were discussing it in the rooms and in the dining-room and in the Club room. So I couldn't tell you whether a half dozen or two

(Deposition of A. J. Carr.)

dozen times. These preliminary discussions extended over three or four days or a week. Dyer was in most of them. I could not say whether he was in all. He was present in the conversations as to which I have testified. As to the conversations referring to Dyer devoting his time to the North Texas Company I know I was present. That discussion was started by Lucey. Lucey was most interested in the company and the largest stockholder in the Lucey Manufacturing Company and the organizer of that company, and the North Texas Supply Company caused to be sold and delivered considerable oil well supplies and machinery. It did a very large business while under the supervision of Dyer. As to the Company for that period making one of the best showings [228] ever made by a company under my supervision for its limited capital, I don't think that is true, considering the advantages that were given it and the conditions. Dyer experienced no more difficulty in obtaining the necessary materials, rotaries, etc., for delivery to his customers than any other concern in the business in that particular territory. He experienced considerable difficulty in obtaining deliveries on all that he wanted. The Company was in the nature of a subsidiary company of the Lucey Manufacturing Company. His company was trying to get deliveries for its trade. At the beginning he was pretty instrumental in these efforts himself, but not so much so towards the latter part. During the last six months most

(Deposition of A. J. Carr.)

of the efforts that were made were Rose and Johnson. For the last two months of last year and the first part of this year we were in a very good position to give deliveries on everything they wanted and more too. On one or two occasions Doan took up with us the question of assisting Dyer in getting deliveries. I think that Dyer slackened up in his efforts to make the business a success some time in the first part of October of last year. I wrote a letter dated January 27, 1920, addressed to Dyer in which I stated that I congratulated him on the remarkable showing made by the company and that I felt sure this success would continue throughout the coming year. I will swear that it was agreed that two drilling companies were to be organized. I will not swear that the organization of the second depended upon the success of the first. Early in 1919 I took up with Lucey the question of having Dyer and Doan come to Texas to investigate the Texas oil fields and assuring them that there were great opportunities. Lucey communicated the information to Dyer and Doan and they afterwards came to Texas. It was the understanding [229] that we should give preference to the North Texas Supply Company in filling orders. We had been anxious to get into that territory. Dyer did have considerable trouble in getting deliveries at different times, and he did, at least on one occasion, take the matter up with Lucey. I received a wire from Lucey telling me to give them deliveries, or that he would dis-

(Deposition of A. J. Carr.)

continue the organization of their company. To the best of my memory the wire to Captain Lucey from the North Texas Supply Company was really a misrepresentation of the facts at that time.

A room was kept at the Fort Worth Club for the benefit of Doan, Dyer and the Lucey boys and half the expense was paid by the Lucey Company. I believe the other half was paid by the North Texas Supply Company. I made no objection to that. As far as I know Dyer sold all the material and supplies that he could get from our company. The probability is that if he could have gotten more deliveries he could have sold more stuff. I will say that conditions at that time did not require salesmanship to be applied in the field. He was a pretty live wire when he first started off but I think he slackened up. The ultimate object of this organization was that the Lucey Company would finally become the owners of the North Texas. That has not been accomplished yet. I have always regarded Dyer as a pretty hard working man and he has got considerable energy. He showed that in the earlier stages of the game, the first few months. I cannot say that he showed it throughout his time. On two or three occasions he said to me that he was very much discouraged and wanted to get back in the operating business.

Redirect Examination

Dyer's ability in the oil business, his wide acquaintance [230] amongst the oil men was the chief reason the organizers of the North Texas

(Deposition of A. J. Carr.)

Company desired him to actively manage the company, and it was discussed there that he would go there and devote his time to it and with his wide acquaintance and experience with the company would make a good showing. He was to give all of his time to the North Texas Supply Company and the drilling companies we contemplated forming and also anything else in the immediate territory that he could take on. The salesmen and purchasing agent of the North Texas Company were secured from the Lucey organization. They were good men and experienced and had worked for the Lucey Company for some time. It was understood that they would be furnished to the North Texas Company and Dyer knew that. Dyer was not under me and I had no control over him. The North Texas Company was an independent corporation. I subscribed for my stock for my own benefit and still hold it. At all times we gave the North Texas Company preference in shipments, even to the extent of curtailing shipment to our own customers. At the time the North Texas went into business we had many advance orders and more than we could supply.

Recross Examination

Dyer went to Shreveport and sold a good deal of stuff there. I had known Dyer in California and known he had been a successful oil man and that was the reason I suggested to Lucey that he and Doan, who had an office together in San Francisco, should come to Texas. I knew that prices

(Deposition of A. J. Carr.)

of rooms, meals and living expenses were very high in Texas. The \$500 salary paid to Dyer was a good salary from the Supply Company's standpoint.

Testimony of L. E. Doan, Jr., for Defendant

L. E. DOAN, Jr., a witness called on behalf of defendant, [231] testified as follows:

I am in Stockton at the present time organizing a new automobile supply business. I have been in the oil business. I spent some time in the Midway Field in 1911 and 1912 and later on in other fields. In 1918 I was in the army; was discharged. I left California for Texas on April 23, 1919. Mr. Dyer and Mr. Hoag accompanied me. I arrived at Fort Worth, Texas, on April 26th. I went to the Fort Worth Club and lived there for a short time until my wife came out later. I went out to the oil fields, to the Burke-Burnett field and made one trip to Wichita Falls with Dyer a few days after I arrived at Fort Worth. I made a trip to Wichita Falls with Lucey, Carr and my father. That was the latter part of May. We left Wichita Falls that night and arrived at Fort Worth the next morning. I saw Dyer in the morning upon my arrival at Fort Worth. Lucey, Carr, my father and I were present. We met Dyer in his room at the Fort Worth Club. He was in bed. Captain Lucey spoke to him first. As I say, Mr. Dyer was in his bed, and Captain Lucey walked into the room and said, "Good morning,

(Testimony of L. E. Doan, Jr.)

Mr. President," and Mr. Dyer asked what he was talking about, something like that, and then Captain Lucey went on to explain that he wanted to organize a supply company in Wichita Falls. He pointed out the advantages of the supply company. He said that the Lucey Manufacturing Corporation was not properly represented up there, they had a contract with some other concern, but their goods were not placed to his satisfaction, and he wanted to put in a company; he could not put in a branch of the Lucey Company on account of a contract he had with the other people, but he wanted to organize a **new company** and put it in there, and he said that he had been up there with Mr. Carr, my father and myself, to look [232] over the situation, and that on account of the wonderful activity up there that the opportunity was very fine for a proposition of that kind, and he wanted Mr. Dyer to go up there and take charge of the company. Mr. Dyer said that he did not want to go into the Supply business, and then my father spoke up and said he would like to talk with Mr. Carr alone, or Mr. Dyer, pardon me. We left the room, and my father and Mr. Dyer remained there, and later when we were all together again Captain Lucey urged on Mr. Dyer the advantages of organizing this new company, and he told them that he could also engage in the oil business up there along with the oil supply business, and he said there was also money to be made in drilling companies, in rig-building companies, and he said that if Mr.

(Testimony of L. E. Doan, Jr.)

Dyer would go to Wichita Falls and take charge of this company and stay there and run it, that he could organize a drilling company, and his oil company, and he said that if he would go there and take charge for him and organize these drilling companies, that he would see that he got a bonus of 10,000 shares of North Texas Supply Company stock, and Mr. Dyer agreed to do it. We talked about the matter all day, and my father urged upon him the wonderful opportunity he had up there, and he said he would go up and take charge of this company. As to the amount of the capital of the North Texas Company, Captain Lucey spoke about that. The whole thing was Captain Lucey's suggestion in the first place; he said that we could organize a company for \$100,000 and subscribe it all, and pay in half of it, and that with the backing and credit that the Lucey Manufacturing Corporation would give us, and credits that they would secure for us from other sources, the Moon Wire Rope Company, the Manhattan Rubber Company, and other concerns that they did business with, would put us in a position [233] to handle a large amount of business on a small amount of invested capital, because they would give us an unlimited amount of credit; and I think something was said about 90 days or more to pay for it if necessary. Mr. Dyer was present at all of this; it was agreed that the members of the Lucey Corporation would take a large block of stock, and Mr. Titus was put down for 10,000 shares; I was

(Testimony of L. E. Doan, Jr.)

put down for 10,000 shares; Mr. Dyer was put down for 10,000 shares; Mr. Johnson was put down for, I think, 9,000 shares, and, at Mr. Dyer's suggestion, Mr. W. J. McLean was put down for 5,000 shares; the balance was taken by the Lucey corporation. Dyer wrote a memorandum of the amount of stock to which the several parties would subscribe. The memorandum introduced and marked Defendant's Exhibit "H".

Defendant's Exhibit "H"

(Letterhead RICE HOTEL.)

Houston, Texas.

Corp.

Paid up within 90 days.

North Texas Supply Co.

Cap—100,000.00 Por. 1.00

Laws—Tex

Pres., B. T. Dyer 500

V. P., L. E. Doan, 2,500, ~~41000.00~~

Sec. Treas., L. E. Doan, Jr.

Fully subscribed

Paid up 50%

10,000.00 B. T. Dyer, San Francisco

50,000.00 L. E. Doan, Oakland, Calif.

10,000.00 L. E. Doan, Jr., Oakland, Calif.

9,000.00 C. J. Johnson, 250 Wichita Falls

10,000.00 Louis Titus, Washington, D. C.

5,000.00 W. J. McLean, San Francisco [234]

As to the conversation held in the afternoon, at which Dyer was present, Mr. Dyer at first objected to going into the supply business, and Cap-

(Testimony of L. E. Doan, Jr.)

tain Lucey urged upon him to go, and he told him that if he would subscribe for this stock and pay for it, and if he would go up there and manage the business, he would see he got a bonus of 10,000 shares of North Texas Supply Company stock, and he also told him that if he was not in a position to buy the stock himself at that time, that he would see that he was carried, that he would make arrangements to carry him for it. I held the position of Secretary and Treasurer of the North Texas Supply Company. I became such at the time it was organized. I resigned, I believe, last March. Dyer did not, during my incumbency, pay for the stock for which he subscribed. That afternoon when the North Texas Company was organized Dyer, Lucey, my father and myself went to the First National Bank and Captain Lucey deposited \$10,000 to the credit of Mr. Dyer, which was for his subscription, or first payment on his subscription for stock in the North Texas Supply Company, and he arranged at the bank, or spoke to Mr. Andrews, the cashier of the bank, and asked him to extend the North Texas Supply Company the credit—every time they needed money—he wanted the bank to know they were good for it, and he told the cashier at that time that he was standing back of it to the extent, if necessary, of half a million dollars. Dyer and I went to Wichita Falls about June 3d. We arrived there on the 4th and immediately started to seek a location for an office. We began business around the first of

(Testimony of L. E. Doan, Jr.)

July. They did sell some stuff in June. I remained in Wichita Falls until the 13th of November, with the possible exception of one or two week-end trips to Fort Worth. We perfected an organization at Wichita Falls upon our arrival. The Lucey Company had turned over a Mr. [235] Johnson who was one of their salesman and a Mr. Ross from their Houston office. Ross was appointed purchasing agent and Johnson selling agent. Dyer remained in Wichita Falls after he went there not to exceed two weeks; then he went to Fort Worth for a short time and then to California. He was gone about a month. I believe he made three trips to California before the first of the year. He made at least three trips East during that period. After the first two weeks at Wichita Falls I will say that Dyer was not there more than one day a week. We all chipped in and did our best in conducting the business. Sometime in November, I believe, Dyer appointed Johnson as his assistant. As to Dyer ever organizing any Drilling Company, he made an arrangement with two contractors to take one of the rigs and drill some holes on a 50-50 basis for the North Texas Company; that was rather an unsuccessful proposition.

I recall the conversation between Dyer and my father at Wichita Falls at the time the final payment was made on the Burke-Burnett piece. I believe my father got there the day the deal was consummated. There was a great deal of talk re-

(Testimony of L. E. Doan, Jr.)

garding the lease. My father stated that he believed that it would be a good idea to lose \$10,000 rather than take a chance and put in this other \$30,000 but there was a chance there, and that Mr. Dyer and I both had been out to see the well, we were not able to find out anything definite about the well from the people who were drilling the well, offsetting it, but Mr. Dyer said he thought there was a good chance to get a well there.

Dyer never organized a rig-building company. The arrangements he made with the contractors was a failure and the rig was finally sold by Dyer to the American Oil and Engineering Company. That was about the middle of November. After it was sold it was [236] employed in the Burke-Burnett field.

I recall the conversation between Dyer and my father on the day the Burke-Burnett deal was closed. I don't recall any conversation and no conversation was had in my presence as testified to by Dyer as follows: " 'Larry, I don't think we had better make this \$30,000 payment, we had better take a loss, let it go by default, because I can stand my share of the loss of the \$10,000 better than I can of the \$40,000.' He said, 'What, you have not lost faith in that, have you?' I said, 'Well, I don't know what you call it, but we have had two weeks at it, and it would look as if there was a little cloud on it, and these fellows next to us seem to be juggling.' He said, 'Well, some friend of mine tells me that he thinks he can sell

(Testimony of L. E. Doan, Jr.)

that'—I think it was for \$75,000—'and I am going to go ahead and make the payment.' ” I do not remember Dyer making any statement as follows: “Well if you want to go ahead and make it we will sink or swim together, and if we lose out we will have to work all the harder, let her go.”

Cross-examination

I stayed there until November 13th. I then went to Shreveport. I think the capital we had to run on was over \$40,000 in July. All the time I was there we never had to borrow any money. We asked the stockholders to pay up what they subscribed for. Dyer objected at first going into the supply business. Said he was down there to be in the oil business. He also said that afterwards. Lucey wanted to get Dyer to agree to take charge of the North Texas Company. He didn't succeed at once. Dyer said he did not want to go into the supply business, and my father took him aside and spoke to him. I think my father said to Captain [237] Lucey, “Let me talk to him alone and you go out.” I was there at the time. Carr was also there. I believe that was in the morning. I don't know what happened between Dyer and my father, except that afterwards Dyer agreed to take charge. Lucey and my father urged Dyer to go up there. Captain Lucey said, “If you will take charge of the company, go up to Wichita Falls and manage it, and take your subscription to the stock of the North Texas Supply Company, if you have earned \$100,000 at the end

(Testimony of L. E. Doan, Jr.)

of the year, I will see that you get a bonus of 10,000 shares of stock." By the end of the year, I mean when the Company has been in business for a year. I do not know if there was anything else said by Captain Lucey at that time or not.

I am twenty-nine years old. The deal that Dyer made with the two contractors to drill a well was as follows: They were to take a rig, and they were to put up a certain amount of money, and the North Texas Supply Company put up a certain amount of money, to meet the initial expenses, and they were to drill a well and split the profit 50-50 with the North Texas Supply Company. They drilled a well and put up \$6,000 on the first well and the North Texas Company put in a rig for about \$15,000. They drilled a second well. They lost money on that. It wiped out all the capital of these contractors and left the North Texas Company with the rig on their hands. The financing of the North Texas Company was attended to by Mr. McLean and myself. Lucey established a credit for us at the First National Bank. Later we established a credit at Wichita Falls. That was \$50,000. I arranged it. Dyer may have written letters to the bank at Wichita Falls. Dyer agreed in talking with Lucey to stay at Wichita Falls until the Lucey Company took the North Texas over; that was a rather indefinite date. Lucey said that [238] eventually the North Texas Company would be absorbed by the Lucey Company. In August, 1919, I think Dyer was in

(Testimony of L. E. Doan, Jr.)

Fort Worth most of the time. In September he was in a great many places. Dyer appointed Johnson Assistant Manager. McLean was the book-keeper. Dyer appointed him when we first organized. Mr. Colby succeeded Dyer as President of the North Texas Company. I was not there at that time.

I have read some of the depositions, but not all of them. Lucey said that they had contracts with some other concerns which would prevent them from going in and putting in their own store in Wichita.

At this point the defendant rested.

Testimony of Joseph Martin, for Plaintiff (In Rebuttal).

In rebuttal, JOSEPH MARTIN was called as a witness for the plaintiff and testified as follows:

I have resided in San Francisco for fifty years. I was in Texas in 1919. I met Doan and Dyer there; we had an automobile trip together. I think Terry, Dyer and myself were present. I remember some conversation with reference to some oil tank cars about May, 1919. Doan said, "Sometime you'll see Doan and Dyer's name on the cars for the oil that came out of the Burke-Burnett field," that is, the Burke-Burnett where they had some property. The conversation was in the automobile.

Testimony of Edward Everett, for Plaintiff

EDWARD EVERETT, called as a witness for the plaintiff, testified as follows:

I reside in San Francisco and am in the manufacturing business. I have known Dyer five years. He was in my office some time in 1919. I remember his using the telephone with reference to Titus. Dyer called Titus from my office. I think that was the latter part of 1919. As I remember, I asked Dyer what the news was from the Doan Oil Company and he said he had no late [239] news. I suggested that he call up Titus and find out right at my office. Of course I only heard one end of the conversation. Dyer then left my office. I don't know whether he went to Titus' office or not.

Testimony of B. T. Dyer, for Plaintiff.

B. T. DYER, a witness called for the plaintiff, testified as follows:

Copy of telegram introduced as Plaintiff's Exhibit 90.

Plaintiff's Exhibit No. 90.

(NITE LETTER)

"Dec. 19th, 1919.

L. E. Doan,

Merchants Bldg Shreveport, La.

Your wire nineteenth received just as I leaving for California I will arrange Santa Maria obligation from California if I am not in Texas before but ask you to send statement Van Nuys Hotel to meet me if possible in time Did you close Santa Maria account since salvage This was not done our last talk

(Testimony of B. T. Dyer.)

on this Stop At same time will you have Doan Oil Co statement Van Nuys for me and also your and my joint account covering Doan Oil Co and Louisiana Stop Will be glad settle both accounts if you wish Stop Try have this for me so I can meet your request Will be Van Nuys for Christmas and keep touch with you Best luck and Merry Christmas Answer.

B. T. DYER."

Above telegram identified by witness as a copy of telegram sent him by Doan. Objection of defendant overruled and exception taken.

Copy of telegram introduced as Plaintiff's Exhibit 91.

Plaintiff's Exhibit No. 91

(WESTERN UNION TELEGRAM.)

"Van Nuys Hotel Los Angeles December 1919

L. E. Doan

Merchants Bldg Shreveport La

Received no word or Santa Marie information at Los Angeles [240] Will fix this up if you can send it here Discounted thirty thousand Lucey accounts in addition have January obligations financed now When can we expect Emery and when do you expect be Ft Worth

B. T. DYER."

Same objection, ruling and exception.

Letter from Lucey to Dyer introduced and marked Plaintiff's Exhibit No. 92.

(Testimony of B. T. Dyer.)

Plaintiff's Exhibit No. 92.

(Letterhead LUCEY MANUFACTURING CORPORATION.)

“Chattanooga, Tenn., Oct. 13, 1919.

Mr. B. T. Dyer, President,
North Texas Supply Co.,
Wichita Falls, Texas.

Dear Sir:

I am in receipt of your statement of September 30th. Please accept my congratulations on the very splendid showing which you have made.

I would like to confirm some standard commercial conditions which we discussed upon your visit to Chattanooga. Your accounts receivable and cash should offset your accounts and bills payable. In your statement you have a deficit of \$40,000.00. In other words, you are over extending the business that much, or, to transact the business which you are transacting, you require an additional \$40,000.00 capital. The only way for you to overcome this condition, is to carry out the original plan and sell only for cash.

I note that you are not giving acceptances for your purchase, and this was the outline of procedure which we agreed upon. There is a very necessary reason why we want you to do this. Had we cared to carry the accounts, we could have installed our own branch. I also advised all our allied companies that you would [241] give them acceptances and I trust you are doing this. If your

(Testimony of B. T. Dyer.)

customers object to paying cash until the completion of an order, you impress upon them the fact that you are compelled to pay cash as your goods are received and you expect them to do likewise,—in fact, I would not accept orders under any other conditions.

In making out your monthly statement, it is always preferable to show in detail the statement of your accounts and bills payable—that is, the date of the original invoice and the date due, although these can be grouped under the different months. The same detail should be carried out in reference to accounts receivable. Our statements always show in detail the month the sale was made under thirty, sixty and ninety days headings, and one heading over ninety days, then a total column.

In reference to your opening up an office in Shreveport, there would be nothing to be gained by your doing this. We organized the company to cover the Wichita Falls district and as we are already represented in Shreveport, there would be no advantage in duplicating our effort. There is a possibility of an opportunity for you in western Oklahoma, Cotton County, to establish a branch, but before doing this, it would be necessary for you to have more working capital or else for business in your present district to be greatly reduced which would release the necessary working capital to enable you to transact business in another field.

In connection with Pumping equipment and Casing—I trust you will not consider this branch of the

(Testimony of B. T. Dyer.)

business until we have had time to go over the details very fully. There is no profit in pipe. It ties up a large amount of working capital without a compensating return. The detail in connection with Pumping equipment is considerable, and the expense of handling that class of goods in and out of your warehouse together with the cost of [242] accounting and collecting does not justify your considering that class of business. The styles of Pumping equipment vary, and you would soon have a very large dead stock, which would mean the tying up just that much additional working capital. In other words, the returns on Pumping equipment in my opinion, does not justify your considering it at this time.

Yours very truly,

J. F. LUCEY,
President.

JFL*S.

Cy to Mr. L. E. Doan, Merchants Bldg., Shreveport.

Mr. A. J. Carr, Mason Bldg., Houston, Texas."

Objected to by defendant on ground of being hearsay, incompetent, irrelevant and a self-serving declaration. Offered by plaintiff on ground that copy sent to Doan and because it was brought out on direct examination by defendant that Dyer did not run the North Texas Supply Company satisfactorily. The Court ruled that it would not be evidence against the defendant unless it contained something that would call for a reply from him

(Testimony of B. T. Dyer.)

and that was allowed to go in subject to the objection. Exception noted.

Mr. METSON.—“Both the letter and the answer have been shown to the defendant on the stand and he testified he thought he remembered something about them, but was not sure.”

I had a conversation with Doan about the North Texas Supply Company at Fort Worth in May, 1919, with respect to its organization. Captain Lucey and Doan came to my room early in the morning. I don't remember anyone else coming in with them that first time. However, his son may have been there. Lucey first addressed me as President, I think he said, “Get up, President,” and I asked him what he meant; he said he wanted to start a supply store in Wichita Falls, and he and Doan had been discussing it on this trip. He said he wanted me to organize it and run it, [243] and I told him that I did not care, I did not want anything to do with it. I said, “Not for me, I am over here in the oil business; I am not a supply man, Captain.” “Well,” he said, “There is a wonderful opportunity up there, and I would like very much to start this store, I cannot start it as a Lucey branch”; then he explained that he had some arrangements with the Continental Supply Company, whereby he could not go in there with a Lucey Branch, and I told him I did not want to go into the Commercial business, that my heart was strictly in the oil game with Doan, and Doan said, “Let me talk to Tom a few minutes, Captain,” and he

(Testimony of B. T. Dyer.)

went out and left us alone. Doan said, "Now, Tom, Captain is very much enthused about putting this store up there, and we have been talking about this, and about the Shreveport, La. game, and that is part of the family affair, and he has agreed if you will go up there and organize this and run it—it is only a temporary affair—that he will go in with us down in the Louisiana property and put up \$50,000 in with us down there; now, there might possibly be a loss, although we do not look for a loss, on the Louisiana lay-out, but the profits that might accrue from this when it is taken over by the Lucey Company, we would have the stock, and if we had a loss in Louisiana they might possibly take up that loss, and it does not make any difference where you are, whether you are at the north pole or south pole, it is a family affair, and our interests are identical, and the captain is very insistent that you do this, and it is going to please him, and I said, "Well, Larry, if that is a part of the game," with a lump in my throat, I said, "I will go out and do my best." He said, "You can go on with your oil business just the same, and it won't be but a short time when the contract with the Continental is off, and Lucey intends to take it [244] over." I said, "All right." We had possibly a fifteen or twenty minute talk. When we got through we went into the Lucey room, and either Doan or myself told Captain that it would be agreeable for me to go in with them and help organize this company; we immediately started that day to start our organiza-

(Testimony of B. T. Dyer.)

tion, and selected who we wanted for directors, and the original stockholders in the charter, and it was understood, Lucey said, that he wanted the control held in trust by Doan, he was selected, because he wanted to take that over, and he did not want the stock scattered all over, where he would have any trouble in controlling or taking it over as soon as he was ready to; he was doing some financing, and intended to take it over shortly; that was the sum of our talk. Later in the day, we were busy gathering the material for the corporation, and gave it to the lawyers, and a lawyer sent a man down to Austin that night, got the charter, and telegraphed up everything was all right, and we immediately started; the next day or two I went on to Wichita Falls and started to look for a location, and it was almost impossible to find. The capitalization was to be \$100,000, with half paid in, at that talk with Captain Lucey. Now, this was the first talk, before Captain Lucey went out of the room. I said, "Captain, I could not go into the supply game and take any stock, because my money, what little I have, is tied up in these leases here." And he said, "You don't need to worry about that, I will carry your subscription for you." A little later on Lucey was in our room, I think it was in our room, and he said, "When you make a success of this, when you make \$100,000, which you ought to make inside of a year, I will see that you get a bonus of 10,000 shares of stock." I talked with Doan about this bonus stock, and it was agreed that this was our joint

(Testimony of B. T. Dyer.)

stock. The idea was, while the little boom was on, we were to [245] get the highest price possible for the goods, and when we got in disfavor, as they called it, for getting high prices, and the little boom had dropped, by that time Lucey would have it arranged to take it over, we would step out and they would step in, and any stockholder that was dissatisfied was to have his stock taken over by Captain Lucey; that was his assurance, that we could tell our stockholders, if they were not satisfied, he would take it over. No definite time was fixed as to when the Lucey Company would take the North Texas over but it was to be within a short time. It was only to be a temporary arrangement. Lucey did not thereafter supply the funds for the stock that was subscribed for by me. I wanted to make good on the stock, so I got Couch to take my subscription over. In the latter part of November, 1919, at San Francisco I told Doan I had met Lucey in St. Louis. I told Mr. Doan that I had told Captain that I had made arrangement to do some work for the American Oil & Engineering Corporation, and that I wanted to know how quick he was going to take over the North Texas, and what his ideas were about it, that after the first of the year I could not give them very much time, and that my business was in the oil business, and I thought that I had fulfilled his wish and Doan's wishes, and he told me I had done remarkably well, and that everything was more than he had anticipated, and he thought I had exceeded what

(Testimony of B. T. Dyer.)

he could do himself, and that he would have somebody that would be mutually agreeable to take it over, and that if they did not take it over by the 1st of the year—it was his hope to have the Lucey Company take it over around the 1st of the year, or shortly thereafter, and for me to go on and look after it like I was doing, and he would give it thought thereafter.

I remember a conversation as to the Lamb tract in the [246] presence of Mr. Doan, Jr., I have no recollection of Mr. Doan, Sr., stating that he had his doubts about the Lamb tract. I did not say that I thought it was a good buy, and should be purchased, in the presence of Mr. Doan, Jr.

With reference to the files, etc., that were in the office that was occupied by Doan and myself in San Francisco, I packed up some files and letters and things out of his desk, and I thought I did a good job and put them in typewriter boxes, putting paper between each layer that came out of his drawer, marked them to L. E. Doan, and my recollection is I shipped them to Shreveport by express. I did not extract one paper from Doan's files. Doan never made any demand on me on the Santa Maria account until the telegram of December, 1919. I had several talks with Mr. Doan, and offered to get the money to pay him; he told me that he was selling off the salvage, and there would not be a great deal of loss to us, and to leave the matter until the salvage money had come in, and when that was all cleared up he would give me the amount, but it

(Testimony of B. T. Dyer.)

would not amount to very much, and he let it run that way, but I made every effort to pay him up, but I had never had a statement from him until that telegram in New York.

I did not have any conversation, or make a request of Mr. Doan in Texas to borrow \$20,000, or in Shreveport to borrow \$20,000 against the Doan Oil Company stock. I did not request Doan to lend me \$30,000. I did not have any conversation with him about buying a piece of land in Oklahoma, a forty-acre tract, and financing it by a loan on the Doan Oil Company stock. Things happened so fast that morning that I did not have time to ask him about any of those things. I went to the *Your* Hotel before Mr. Doan came downstairs, it was too early to call him, I thought, [247] and he came down just a little before 8; he had not been in the dining-room, and I asked how the production was, and he said, "Oh, pretty good," and asked me if I had had my breakfast, and I told him I had. So I walked into the dining room with him and sat down at the table, and I said, "Larry, I want to get that agreement between us as partners fixed up, in case you or I die"; he just looked up and said, "I have decided you have no interest with me." And I said, "What?" He said, "You have not kept your contract, and you have not made a success of the North Texas Supply Company." I said, "Why, look at your statement, you know it is a success." He said, "You are a damned liar." I was pretty sore, and said nobody could call me a damned liar and get

(Testimony of B. T. Dyer.)

away with it, and as I related the other day I jumped up, and I turned around and said, "Is that your answer"? And he said "Absolutely, and I will fight till hell freezes over," and I walked away, and the next day I got a telegram of apology from him. That conversation was in March, 1920. I must have had a conversation with Doan in January, 1920, at Fort Worth. Doan at that time did not tell me I had no interest in Louisiana. He spoke to me about getting the money for the Doan Oil Company for my interest with him in the Doan Oil Company, and he also spoke about a possible sale. As I recall it, I told him if there was going to be a sale I did not want to get this money. I would have to pay interest, or I would have to pay something for getting it, and think I wrote him later on about that. I told him at that time I could finance it. I offered to put the money in, always wanted to put the money in, and I told him that I would get, I could get it from Fleishhacker, I could get it from the American Oil & Engineering Company.

Letter introduced and marked Plaintiff's Exhibit 93. [248]

(Testimony of B. T. Dyer.)

Plaintiff's Exhibit No. 93.

(Letterhead SANDERSON & PORTER.)

"New York, December 18, 1919.

B. T. Dyer, Esq.,
Fort Worth Club,
Fort Worth, Texas.

My dear Mr. Dyer:

Referring to our conversation in the early part of November regarding your Louisiana interest in the Doan Oil Company, I have considered this matter and can assure you that should you wish this loan of \$50,000 I will be able to arrange this for you through our banking connections here, which I am sure will be agreeable to you.

Should you come to the point of wanting this, please advise.

Sincerely yours,

623

SETON PORTER."

I showed the above letter to Doan. I did not buy any water well, although Doan testified that I did. The conversation with Doan was this: I told Doan, or wrote him, Mr. Delaney, a very close friend of mine, had been down in Stevens County, and reported to me that the Mid-Kansas had a fine well, in the northern portion of Stevens County; at the same time I was offered 100 acres just west of this Mid-Kansas well by a broker in Fort Worth. Delaney told me that he thought it was a good buy.

(Testimony of B. T. Dyer.)

I received the first check from the American Oil & Engineering Company in January, 1920. It has been increased since to \$1250. I never received any money before January from that Company.

With reference to Exhibit 56, the words, "good news" are in regard to the Giffin well. [249]

With reference to the Considine-Martin deal, I did all I could and all that was required of me. I got Joe Terry a map, gave him data; and he was in my room several nights until after midnight, getting information about this country. He knew nothing about it. Later on, I got maps again and in San Francisco I helped when I had time to fill in; there were people came to me, and I went to two people and spoke about it, and they took stock in it. They were Dr. Graham and Dr. Hopper. They became members of the Considine-Martin Syndicate.

As to the North Texas Supply Company, the average capital for the year was a little over \$40,000. Lucey told me that they were going to take the property over in 1920. He said they would advance a credit of \$750,000, but they never did. I was in Wichita Falls practically all the time in June, with the exception of a day or two when I would go to Fort Worth, I was getting a place to put our stores, a warehouse—I put in practically all the time in June. The first part of July I came out to California, and tried to buy casing and tool joints, I could not get casing here—I placed a big order for tool joints, of which they did not deliver

(Testimony of B. T. Dyer.)

afterwards but a part of them, but during that time I closed up my house and had an operation on my nose, and went back; but I gave all of that month, and after that I was busy with the North Texas, and did not have a chance to get out to do much oil business, and the organization ran along as smooth as a clock, and made money hand over fist, and we could have sold a world more of goods if we had had them delivered; I started to fight the Lucey Company from the top down to deliver the goods, and the President would pass the buck to some man in Texas, that he had not given me goods, and if they were not going to give me goods he was going to ask us to close [250] the North Texas Supply Company up, and I fought them all the way down, Mr. Doan fought them, and was with me, and said I was right, and by fighting, and fighting, and fighting, we did get some goods, and we made a lot of money.

I transacted business for the North Texas Company in California on that first trip. In August I was in Wichita Falls almost all of the month with the exception of a few days when I ran up to Fort Worth. In September up to the 22d I was in Wichita Falls and Fort Worth. Fort Worth is the center of all the great activities; a great many of the big companies operating Wichita Falls have their head offices in Fort Worth, and everybody goes there to do the big business, to get their money to carry on the big business. That is the center of that section. In September I made a trip to Pitts-

(Testimony of B. T. Dyer.)

burgh, Houston and Chattanooga. Doan said to me, "Why don't you go to Pittsburgh, and Houston and Chattanooga, and perhaps you can get more goods." We were short of deliveries at that time. I made the trip and went to New York. I returned to Wichita Falls in September. In November I made a trip to buy 40 miles of pipe-line, from the Lucey Company or anybody I could get it from for the American Oil & Engineering Company. I was acting for the North Texas Supply Company. I went to Tulsa, St. Louis, Chicago, Pittsburgh, and finally I went to New York. Later, in November, I went to California, and then returned to Wichita Falls. While I was away the North Texas Company was run as follows: I had placed each man in his particular department, and the sales part was run by Mr. Johnson, the buying by Ross, and I had them confer, and every night I would get a night letter covering all of the facts, the bank balance, the collections, and anything of importance that had happened, and I was in touch with them every day; I would get a [251] night letter, and would know exactly what was going on in every respect.

Doan did not tell me in the latter part of April or first part of May, 1919, tell me he was going to operate in Louisiana with Titus and that it would be on an entirely different basis, and that Titus would be interested with him in everything in Louisiana. On or about that time, he did not put it this way, that he would not take me to

(Testimony of B. T. Dyer.)

Louisiana and did not want me down there and that I would not be permitted to go to Louisiana. He wanted me to look after the Texas and Oklahoma end and he would look after the Louisiana end.

Doan never had any such talk with me as follows: "I told Mr. Dyer if he would get his money from the California Syndicate, if he would take 10,000 shares of the stock of the North Texas Supply Company and pay for it, and if he would organize the drilling companies for the North Texas Supply Company and stayed at Wichita Falls and made that his head quarters, and run that business, and devote his whole time to that business, that I would carry him for Louisiana, provided he did those things, it was entirely contingent on his doing those things." The California Syndicate was a little bunch of people out here that indicated they would put in some money if I was going into the oil game, and I went around and saw them and got about \$50,000, and I looked at many different things, and I told Doan all about it, and he was pleased, and I was pleased, and if we could find anything that was good, I was to get a quarter interest, which was our common property, equally divided. I looked at many propositions, but never used that money. I never found a safe place to employ that money.

With respect to the conversation on May 30th about the organization [252] of the North Texas Company, what was said about organizing drilling

(Testimony of B. T. Dyer.)

companies was as follows: There was absolutely no contract made or no definite arrangement made about any drilling company, or any rig-building company. Captain Lucey suggested that it would be a good plan, possibly, to let some contractor have a rig on a 50-50 basis; he mentioned a Mr. Wrenn, and Mr. Edging—he afterwards told me not to let Mr. Wrenn have the rig, he being a poor risk; he said to tell Mr. Edging that he had left the matter entirely in my hands, whether I was to give him a rig, or not. There was a talk later on that they might form a rig-building company out of Lucey's employees, but no contract or no set thing about it at all; it was a general conversation that these things were possible. I did let Mr. Edging have a rig, and it was a failure. The American Oil Company took it over. The first party to be put in charge there was Edging, who was recommended by Lucey. As to the drilling conditions when the North Texas was first organized, there were a great many drilling, and of course you could not get rigs. When our rig did come in, it came straggling along; they came in half completed, evidently; there were great many things short, and after a month or six weeks he got it to going, and then came an embargo, people could drill wells down to the sand, but the Commission would not allow them to bring them in, and that knocked the bottom out of us right there and the contractors commenced to lose money and commenced to fly back to Oklahoma.

(Testimony of B. T. Dyer.)

I do not remember any conversation in July, 1919, in San Francisco with Titus. I did have a conversation with him at his office in the latter part of December, 1919. I telephoned Titus and then went to his office. Mr. Titus told me that my place was right down in Shreveport, with Larry Doan, that he had [253] too much to do, and I told him I quite agreed with him, and he said that he was going back shortly after the holidays, and wanted to know if I would be in the neighborhood around Fort Worth, where he could get hold of me, that he was going to insist that I come down there and work right with Larry, because he had too much to do and he could not handle it all, and two heads were better than one. That was in the latter part of December, 1919.

Cross-examination.

It is correct that when Lucey first spoke to me about the North Texas Company and suggested that I should subscribe and pay for stock that I told him that my money was tied up in leases there. I had a very few thousand dollars tied up in leases. It was about \$5,000. It was tied up in an indirect way, in expenses of going. As to what leases I had in Texas and how much money I had tied up there was the Stevens County leases and I put some money in an automobile that we used. I do not think I can give you any one lease that I had a thousand dollars tied up in at the end of May, 1919. I had money tied up in fees, lawyer's fees. As to any amount that I had tied up in leases, I had

(Testimony of B. T. Dyer.)

\$500 tied up in the Eastland County lease. That money was paid to Olcott. I got it back when it was sold. I had \$500 tied up in that lease in May, 1919. As to whether I had any other money other than this \$500 tied up in any leases at that time I had just a few attorney's fees. One was \$75 and one was \$100. That was all the money I had tied up in leases at the time I talked with Captain Lucey. I had profits and dividends paid to me on the Bosque County leases and on the Stevens County leases and I think I received compensation on other leases from Doan. I got a little over \$2,000 out of the Bosque County lease and I got the Jergens [254] commission, which I divided with Doan, \$750.00 apiece; also the Eastland County lease was \$6400 between us, and the Couch 100 acres, that was \$7000 between us, and the Archer County lease made \$750, which we divided; and the Oklahoma lease, which has not been settled yet. All of those profits had been made out of operations in Texas from August, 1918, to the end of May 1919. All the letters and telegrams from Doan which have been introduced in evidence were received by me at the various points to which they were addressed, California, New York, Chattanooga, Chicago, Pittsburgh and the other points as shown by the telegrams. On my trip to California in July, I was there about three weeks. On Thanksgiving day I was in Los Angeles, and also on Christmas of that year. I think I made three trips to New York from June 1st, 1919, until the

(Testimony of B. T. Dyer.)

end of the year. I came to California in July to get casing. No, they do not make casings in California. I was in pretty close touch with the Lucey Company and we had their purchasing agent at Wichita Falls take care of the purchases. I did not figure that I could order supplies or materials by letter or telegrams as well as by any other means. I figured I could go through the fields and get second-hand casing. I came to California for the purpose of getting second-hand casing and tool joints. Lucey was not delivering it to us.

As to the 40 miles of pipe-line that I said I was selling for the North Texas Company. The American Oil & Engineering Company was going to build a pipe-line for a man named Ulch. I think I first heard of it in October. Mr. Porter of the American Oil Company was very anxious to get it and pipe was very high. I helped him in Wichita Falls, we went around and saw many people there and thought we had it, and there was a person [255] came in to the North Texas Supply Company and said that he could get it. Mr. Porter came to Wichita Falls and wanted the pipe for use in the Burke-Burnett district and I purchased it for the American Oil Company from Stewart & Laughlin through Lucey. It was handled through Lucey's Pittsburgh office. The North Texas Company made no profit on it. The American Oil Company made no profit on the pipe—only on the contract work. The profit accrued to the American Oil Company eventually.

(Testimony of B. T. Dyer.)

In the fall of 1919 the rig that had been sold originally by the North Texas Company to Edging was sold to the American Oil Company. I handled that transaction. Some time later the American Oil Company put the rig in operation. It was not a success and they never got their money from the hole they drilled.

In the letter of Jan. 21st which I addressed to Doan, I stated that I would have to give up a small part of Doan Oil Company stock in order to get this money. The reason of that was that I figured that Mr. Fleishhacker, if I got it from him, which he told me I could, I figured that as a matter of courtesy I would give him a part of it; I was going to give him a piece of it; I figured about a quarter interest. That was what I meant in my letter of January 21st.

The first talk I had with reference to my entering the employ of the American Oil Company was about the first of October. I went to New York and met Mr. Seton, Mr. Porter and Mr. Meredith. We reached no conclusion at that time. I first agreed with them to render services in the latter part of the year. I think it was in November that I encouraged them and settled it in December, when I went there for a meeting. The January check I received was for December services. At our first meeting they spoke of bonus stock. I was to be given that after it had been earned. [256] I got it at par and it was held in escrow.

As to Exhibit No. 83 being a letter from Titus

to Doan, Doan gave me that in Shreveport; I don't recall when.

The following extracts from the deposition of J. F. Lucey offered in evidence on behalf of plaintiff:

Extracts from Deposition of J. F. Lucey.

It would be impossible for me to state what conversations took place in the presence of Mr. Dyer (referring to the conversations at the time the North Texas Supply Company was organized) and what took place when Dyer was not present. I can state what was outlined to Doan before we discussed anything with Dyer and then the arrangement with Dyer was left to Doan to a very large extent. I suggested that Dyer become a stockholder and I gave him more or less the details. As to how he was to subscribe for it and pay for it was left to Doan. We talked about Dyer subscribing to stock, but I cannot state that Dyer ever committed himself to subscribe for any stock, but it was my intention that he should and I expected that he would subscribe for stock in the Company. I remember making the statement that if for any reason Dyer was not in position to immediately pay for his stock we could make arrangements to carry it for him until such time as he could arrange his finances. After the enterprise was launched I gave it very little personal attention, except that Dyer kept constantly communicating with me, to assist him in securing addi-

tional supplies. Dyer communicated with me with reference to severing his connection with the company. He stated the reasons but I cannot recall them at this time. The Lucey Company wanted to establish a branch at Wichita Falls and we wanted a good man to take charge of that territory. I picked out Dyer. It was my suggestion and not Doan's suggestion to me. [257]

Mr. Carr, Mr. Doan and myself visited Wichita Falls. We did not go out in the field. Our manager had been very anxious to establish a branch there, but I did not care to establish a branch in our own company, and in looking over the ground and considering the situation that existed, I felt it would be better to go in there with a subsidiary company, and I first talked over with Mr. Carr the formation of this company, and after he had agreed with me, then I broached the matter to Mr. Doan, suggesting that it would open up a position for his son if he would become identified with that company and that we would make Mr. Dyer the president of the company. The whole scheme of organization was mine, and the selection of not only young Doan, but Mr. Dyer."

At this point the testimony was closed and thereafter the Court made its interlocutory decree on the 18th day of January, 1921, and by that decree ordered that the proceeding be referred to H. M. Wright, Esq., as the Special Master to take and make an account and inquiry as specified in said interlocutory decree.

Pursuant to the order of the Special Master defendant filed a written account which was subsequently amended. The following are the first verified account and the amended verified account of L. E. Doan, omitting the formal parts thereof, verifications, and also omitting the accounts of the Doan Syndicate, which is not material to any of the issues herein presented.

“ACCOUNTS OF L. E. DOAN.

Statement of Assets.

93,000 shares of stock of Doan Oil Company.

15,000 shares of stock of Considine Martin Oil Company. [258]

PARTNERSHIP ACCOUNT OF RECEIPTS AND DISBURSEMENTS.

DEBITS.

93,000 shares of stock of Doan Oil Co.	
on hand	\$ 93,000.00
Dividends received on 93,000 shares of	
stock of Doan Oil Company	46,500.00
Amount of refund on Considine Martin	
stock	2,666.66
Dividend received from Considine Mar-	
tin Oil Company	150.00
<hr/>	
TOTAL DEBITS:	\$142,316.66

CREDITS.

Cash paid for 93,000 shares of stock of Doan Oil Company	\$ 93,000.00
Interest on investment as per attached statement	10,208.05
Amount paid for Considine Martin stock	2,666.66
Loss sustained on Wehr Haywood Syn- dicate:	
Invested	\$1,000.00
Returns thereon	400.00
	<hr/> 600.00
Balance to be accounted for to joint ac- count of B. T. Dyer and L. E. Doan .	35,841.95
	<hr/>
TOTAL CREDITS:	\$142,316.66

STATEMENT OF ACCOUNT BETWEEN B. T.
DYER AND L. E. DOAN.

DEBITS.

Fifty per cent of balance accounted for by L. E. Doan to joint account	\$ 17,920.975
Interest due from L. E. Doan to B. T. Dyer on dividends of Doan Oil Com- pany	1,424.06
	<hr/>
TOTAL DEBITS:	\$ 19,345.035

CREDITS.

Fifty per cent of purchase price paid for		
Doan Oil Company stock	\$	46,500.00
Balance due January 1, 1918,		
from B. T. Dyer to L. E.		
Doan on Doan Syndicate		
deal:	\$	6,000.00
Less cash payment Jan. 21,		
1920	3,000.00	3,000.00
<hr/>		
Interest on last item to March 1, 1921. . .		665.00
Amount due from Dyer to Doan in re		
Doan Syndicate operations		553.47
Forward:		50,718.47
[259] <hr/>		
Proceeds of sale retained by B. T. Dyer		
on Oklahoma lease sale		2,070.00
<hr/>		
Total Credits:	\$	52,788.47
Total Credits exceed total Debits by the sum of		
\$33,443.435, which represents the net sum due		
from B. T. Dyer to L. E. Doan upon an equal		
division of the assets.		

STATEMENT OF NET INVESTMENT OF L. E. DOAN AND INTEREST DUE L. E. DOAN.

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
Clark & Greer	1919 4-10	\$1,000.00	1	10	21	132.42
“	5-19	2,000.00	1	9	12	249.67
Thigpen & Harold	5-17	25.00	1	9	14	632.08
Clark & Greer	“	5,000.00				
Mack Levy	“	22.50				
Barham Drilling Co.	5-23	2,800.00	1	9	8	346.11
Mack Levy	“	7.50				
C. A. Giffen	5-27	150.00	1	9	4	19.34
L. E. Doan, Jr.	“	7.60				
Barham Drilling Co.	5-31	6,000.00	1	9		734.96
S. S. Raymond	6- 1	152.10	1	9		18.57
Texas Map Co.	6- 3	15.00	1	8	28	1.83
Geo. O. Baird	6-17	50,000.00	1	8	14	6,105.73
Barham Drilling Co.	6-19	3,000.00	1	8	12	833.02
C. A. Giffin	“	4,000.00				

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
	1919		Yrs.	Mos.	Days	
Youree Hotel	6-25	39.99	1	8	6	4.71
Louis Titus	6-14	14,000.00	1	8	17	1,679.65
Youree Hotel	6-29	76.92	1	8	2	9.01
Geo. O. Baird	7-15	51,000.00	1	7	16	5,811.33
Globe Lbr. Co.	7-16	2,200.00	1	7	15	250.26
Youree Hotel	7-23	56.11	1	7	8	6.39
Miss Parish	7-25	4.50	1	7	6	.50
Globe Lumber Co.	7-28	640.00	1	7	3	82.45
W. K. Henderson	"	100.00				
Jennings Tank Co.	7-7	368.00	1	7	25	198.43
Askew	"	1,050.00				
C. A. Giffin	"	300.00				
Youree Hotel	7-8	48.35	1	7	23	34.20
Underwood	"	247.94				
C. A. Giffin	7-11	1,000.00	1	7	20	143.69
C. A. Giffin	"	127.45				
E. L. Edwards	"	125.00				

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
S. S. Raymond	7-15	300.00	1	7	16	40.11
Shreveport Blue Print Co.	7-15	21.50				
Yoree Hotel	"	49.52				
J. B. Stephens	7-30	146.66	1	7	1	16.29
Yoree Hotel	7-29	63.24	1	7	2	7.11
Ice Co.	8-5	1.55	1	6	26	.28
[260]						
A. W. Gammer	8-5	1.00				
S. S. Raymond	8-2	555.35	1	6	29	61.45
"	8-4	300.00	1	6	27	33.08
W. K. Henderson	8-5	18.00	1	6	26	.33
Miscellaneous Expenses	8-6	236.40	1	6	25	102.88
C. A. Giffin	"	700.00				
C. A. Giffin	8-7	300.00	1	6	24	99.60
C. A. Giffin	"	359.75				
C. A. Giffin	"	246.98				
C. A. Giffin	"	1.50				

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
Ice Co.	8- 5	13.00	1	6	26	316.95
Telephone	"	18.00				
E. E. Lemond	"	2,784.11				
Lucy Mfg. Corpn.	8- 7	50.77	1	6	24	5.57
Youree Hotel	8- 6	20.50	1	6	25	460.48
Oil City Iron Works	"	4,170.88				
Keith Motor Co.	8-10	901.25	1	6	21	98.34
Miss Kennedy	8-15	55.00	1	6	16	5.95
W. K. Henderson	8-13	2,187.00	1	6	18	245.12
Youree Hotel	"	69.43				
K. Lockett	"	2.75				
J. B. Stephens	8-15	100.00	1	6	16	10.80
Milo Drilling Co.	8-16	2,000.00	1	6	15	215.84
Blue Print Co.	8-15	3.00	1	6	16	2.88
Chamber of Commerce	"	12.50				
Telephone	"	6.70				
E. L. Edwards	"	4.50				

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
K. C. S. Railway	8-21	259.46	1	6	10	27.16
Petty Cash	8-22	25.00	1	6	9	2.67
J. B. Robinson	8-15	2.50	1	6	16	.27
J. E. Underwood	8-20	228.48	1	6	10	24.43
Gas Company	8-22	65.29	1	6	9	12.94
Youree Hotel	"	52.45				
Telephone	"	3.50				
Price Waterhouse Co.	8-16	194.70	1	6	15	21.01
Querbes and Bourquin	8-22	87.00	1	6	9	9.29
S. S. Raymond	8-26	194.80	1	6	5	17.49
Hotel Company	8-27	50.00	1	6	4	5.29
Telegram—1st Nat. Bank	8-24	1.30	1	6	17	.14
P. C. Doggett	8-15	25.00	1	6	16	2.70
Barham Drilling Co.	8-21	346.50	1	6	10	37.05
Gulf Co.	8-26	14.00	1	6	5	6.55
L. J. Munn	"	20.12				
P. Lee	"	19.12				

PAYEE.	Date Paid	Amount Paid	Interest computed to Mar. 1, 1921, at 7%		
			Yrs.	Mos.	Days
W. H. Brown	1919	5.00			Interest
J. C. Allen	"	3.50			
Merchants Building Co.	9- 1	39.50	1	6	4.15
Western Union	8- 5	47.12	1	6	197.27
J. L. Keenan	"	250.00			
C. A. Giffin	"	500.00			
[261]					
W. G. Ray	8- 5	500.00			
C. A. Giffin	"	300.00			
Mrs. Kennedy	"	55.00			
J. B. Stephens	"	100.00			
Cash—L. E. Doan's	12-19	5,000.00	1	2	420.01
"	12-31	10,000.00	1	2	816.69
Oklahoma Lease	5-10	8,060.00	1	9	1,020.33
Leonard Lease	5-19	10,000.00	1	9	5,118.31
Burkburnett Lease	"	30,000.00			

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.		
			Yrs.	Mos.	Days
Comanche County Lease	"	1,000.00			
47 Acre Lease	5-23	500.00	1	9	8
"	5-27	3,047.50	1	9	4
Cash	7-15	10,000.00	1	7	16
Burkburnett Lease	5- 5	10,000.00	1	9	26
Bull Bayou Lease	6-10	3,000.52	1	8	21
Cash	9- 1	48,738.53	1	6	
Automobile		2,665.00			
		<u>\$306,665.70</u>			
					<u>35,093.96</u>

PAYOR—SOURCE

Oklahoma Lease Sale	5-15	3,530.00	1	9	16	443.18
"	6-10	5,387.50	1	8	21	650.56
Louis Titus	5-23	10,000.00	1	9	8	1,240.59
"	5-27	10,000.00	1	9	4	1,232.82

PAYEE.	Date Paid	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
"	4- 1	10,000.00	1	11		1,341.71
"	4- 6	10,000.00	1	10	25	1,331.99
"	6-19	25,000.00	1	8	12	2,975.09
"	6-27	15,000.00	1	8	4	1,761.72
"	7-15	20,000.00	1	7	16	2,278.95
"	7-22	10,000.00	1	7	9	1,125.87
"	8-12	20,000.00	1	6	19	2,173.95
J. F. Luey	6-19	25,000.00	1	8	12	2,975.09
J. F. Luey	6-15	24,670.00	1	8	16	2,954.90
R. E. Doan	12-31	5,000.00	1	2		1,225.04
C. E. Doan	"	5,000.00				
H. A. Doan	"	2,500.00				
N. E. Doan	"	2,500.00				
L. E. Doan, Jr.	6-27	10,000.00	1	8	4	1,174.45
		<u>\$213,587.50</u>				<u>24,885.91</u>
BALANCES		<u>93,078.20</u>				<u>10,208.05</u>

AMENDED ACCOUNT OF L. E. DOAN.

Statement of Assets.

93,000 shares of stock of Doan Oil Company.
 15,000 shares of stock of Considine Martin Oil
 Company. [262]

PARTNERSHIP ACCOUNT OF RECEIPTS
AND DISBURSEMENTS.

DEBITS.

93,000 shares of stock of Doan Oil Co.	
on hand	\$ 93,000.00
Dividends received on 93,000 shares of	
stock of Doan Oil Company.....	46,500.00
Amount of refund on Considine Martin	
stock	2,666.66
Dividend received from Considine Mar-	
tin Oil Company.....	150.00
	<hr/>
TOTAL DEBITS.....	\$142,316.66

CREDITS.

Cash paid for 93,000 shares of stock of	
Doan Oil Company.....	\$ 93,000.00
Interest on investment as per attached	
statement	9,149.30
Amount paid for Considine Martin stock	2,666.66
Loss sustained on Wehr Hay-	
wood Syndicate 3-30-19 In-	
vested	\$1000.00
Returns thereon.....	400.00 600.00

Balance to be accounted for to joint ac-
count of B. T. Dyer and L. E. Doan 36,900.70

TOTAL CREDITS.....\$142,316.66

STATEMENT OF ACCOUNT BETWEEN
B. T. DYER AND L. E. DOAN.

DEBITS.

Fifty per cent of balance accounted for
by L. E. Doan to joint account.....\$ 18,450.35
Interest due from L. E. Doan to B. T.
Dyer on dividends of Doan Oil Com-
pany 1,424.06

TOTAL DEBITS.....\$ 19,874.41

CREDITS.

Fifty per cent of purchase price paid for
Doan Oil Company stock.....\$ 46,500.00
Balance due January 1, 1918,
from B. T. Dyer to L. E.
Doan on Doan Syndicate
deal\$6000.00
Less cash payment Jan. 21, 1920 3000.00 3,000.00

Interest on \$6,000 from
1-1-18 to 1-21-20...\$ 863.33
Interest on \$3,000 from
1-21-20 to 3-1-21... 233.33

\$1096.66 1,096.66

Forward.....\$ 50,596.66

Forward.....	\$ 50,596.66
Amount due from Dyer to Doan in re Doan Syndicate operations.....	553.47
Proceeds of sale retained by B. T. Dyer on Oklahoma lease sale.....	2,070.00

TOTAL CREDITS....\$ 53,220.13

Total credits exceed total debits by the sum of \$33,345.72, which represents the net sum due from B. T. Dyer to L. E. Doan upon an equal division of the assets.

PAYMENTS MADE BY L. E. DOAN AS TRUSTEE FOR DOAN, TITUS AND LUCY, PRIOR
TO SEPT. 1, 1919,—SUBSEQUENTLY RATIFIED BY AND TAKEN INTO ACCOUNTS
OF DOAN OIL COMPANY.

Checks drawn on 1st Nat'l Bank
of Fort Worth.

Date Paid 1919	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%			Interest
			Yrs.	Mos.	Days	
Apr. 10	Clark & Greer	\$1,000.00	1	10	21	\$ 132.42
May 5	Burk Burnett Lease	10,000.00	1	9	26	1,275.56
" 10	Oklahoma Lease	8,060.00	1	9	21	1,020.29
" 17	Clark & Greer	2,000.00	1	9	14	1,508.62
" 17	Thigpen & Herrold	25.00				
" 17	Jno. McAlvey	22.50				
" 17	Leonard Lease	10,000.00				
" 19	Burk Burnett Lease	30,000.00	1	9	12	3,745.00
" 22	Camanche Lease	1,000.00	1	9	19	124.25
" 23	Clark & Greer	5,000.00	1	9	8	1,030.60
						331

B. T. Dyer.

Date Paid	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%			Interest
			Yrs.	Mos.	Days	
1919						
" 23	Barham Drilling Co	2,800.00				
" 23	47 Acre Lease	500.00				
" 23	Shreveport Blue Print Co.	7.50				
" 27	Advertising	7.60	1	9	4	.94
" 31	47 Acre Lease	3,047.50	1	9	—	1,127.67
" 31	C. A. Giffen	150.00				
" 31	Barham Drilling Co.	6,000.00				
June 1	S. S. Raymond	152.10	1	9	—	18.64
" 3	Texas Map Co.	15.00	1	8	28	1.83
" 10	C. A. Giffen	3,000.53	1	8	21	362.32
Checks drawn on 1st Nat'l Bank of Shreveport.						
1919						
June 17	G. O. Baird	50,000.00	1	8	14	5,969.45
" 19	Barham Drilling Co.	3,000.00	1	8	12	832.99

Date Paid	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%		
			Yrs.	Mos.	Days Interest
1919					
" 19	Chas. Giffen	4,000.00			
" 25	Youree Hotel	39.99	1	8	6 1,654.38
" 25	Louis Titus	14,000.00			
July 3	Youree Hotel	76.92	1	7	28 8.94
July 7	Jennings Tank Co.	368.00	1	7	24 198.43
" 7	J. H. Askew	1,050.00			
" 7	Chas. Giffen	300.00			
July 8	Shreveport Hotel Co.	48.35	1	7	23 34.17
" 8	J. E. Underwood	247.94			
" 11	Chas. A. Giffin	127.45	1	7	20 143.69
" 11	Chas. A. Giffin	1,000.00			
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July 11	E. L. Edwards	\$ 125.00			
" 15	S. S. Raymond	300.00	1	7	16 \$5,853.44
" 15	Geo. C. Baird	51,000.00			

Date Paid 1919	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%			Interest
			Yrs.	Mos.	Days	
" 15	Shreveport Blue Print Co.	21.50				
" 15	Shreveport Hotel Co.	49.52				
" 16	Bull Bayou Acreage	2,200.00	1	7	15	250.26
" 23	Shreveport Hotel Co.	56.11	1	7	8	6.32
" 25	Parelle Parish	4.50	1	7	6	.50
" 28	Bull Bayou	640.00	1	7	3	82.45
" 28	W. K. Henderson	100.00				
" 30	J. B. Stevens	146.66	1	7	1	24.44
" 30	Shreveport Hotel Co.	63.24				
" 30	Telegram (Bank chg.)	1.30				
Aug. 2	S. S. Raymond	555.35	1	6	29	61.45
" 4	S. S. Raymond	300.00	1	6	27	33.08
" 5	Consumers Ice Co.	1.55	1	6	26	11.02
" 5	A. W. Gammer	1.00				
" 5	Shreveport Ice Co.	1.50				

Date Paid	Payee	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
1919						
"	5 E. E. Lemond	18.00				
"	5 Western Union	47.12				
"	5 W. K. Henderson	18.00				
"	5 Cumberland Telephone Co.	13.00				
"	6 Shreveport Hotel Co.	50.77	1	6	25	489.76
"	6 L. E. Doan Expenses	236.40				
"	6 Oil Well Supply Co.	4,170.88				
"	7 Chas. A. Giffin	359.75	1	6	24	511.16
"	7 Chas. A. Giffin	700.00				
"	7 Chas. A. Giffin	300.00				
"	7 Chas. A. Giffin	246.78				
"	7 Lucy Mfg. Corp'n. of Texas	2,784.11				
"	7 Oil City Iron Works	20.50				
"	7 J. L. Keenan	250.00				
"	10 Wm. D. Keith Motors Co.	901.25	1	6	21	98.34
						335

B. T. Dyer.

Date Paid	Payee	Amount Paid.	Interest computed to March 1, 1921, @ 7%.			Interest
			Yrs.	Mos.	Days	
1919			1	6	18	245.12
" 13	W. K. Henderson	2,187.00				
" 13	Kute Lockett	2.75				
" 13	Shreveport Hotel Co.	69.43				
" 15	Mrs. W. Kennedy	55.00	1	6	16	22.60
" 15	J. B. Stevens	100.00				
" 15	E. L. Edwards	4.50				
" 15	Shreveport Blue Print Co.	3.00			..	
" 15	Cumberland Tel. Co.	6.70..				
" 15	J. B. Robinson	2.50				
" 15	Shreveport Chamber Commerce	12.50				
" 15	P. E. Doggett	25.00				
" 16	Milo Drilling Co.	2,000.00	1	6	15	236.85
" 16	Price Waterhouse Co.	194.70				
" 20	J. E. Underwood	228.48	1	6	11	24.48
" 21	Agt. K. C. S. Ry.	259.46	1	6	10	64.79

Date Paid 1919	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%		
			Yrs.	Mos.	Days
" 21	Barham Drilling Co.	346.50			
" 22	Shreveport Hotel Co.	52.45	1	6	9
" 22	Suertes & Bourquin	87.00			
" 22	S. W. Gas & Elec. Co.	65.29			
" 22	Petty Cash	25.00			
" 22	Cumberland Telephone Co.	3.50			
" 26	S. S. Raymond	194.80	1	6	5
" 26	J. C. Holly	3.50			
" 26	W. H. Brown	5.00			
" 26	P. Lee	19.12			
" 26	L. J. Munn	20.12			
" 26	Gulf Refining Co.	14.00			

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Date Paid	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%			Interest
			Yrs.	Mos.	Days	
1919						
Aug. 27	Shreveport Hotel Co.	\$50.00	1	6	4	5.29
" 29	Chas. A. Giffin	500.00	1	6	2	52.69
" 30	J. B. Stephens	100.00	1	6	1	100.46
" 30	Mrs. W. Kennedy	55.00				
" 30	C. A. Griffin	300.00				
" 30	W. G. Ray	500.00				
Sept. 1	Merchants Bldg. Co.	39.50	1	6	—	4.15

PAYMENTS MADE BY L. E. DOAN TO DOAN OIL COMPANY DIRECT SUBSEQUENT
TO SEPT. 1st, 1919.

Date	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%		
Paid			Yrs.	Mos.	Days
1919					Interest
Sept. 2-19	L. E. Doan Cash	\$48,738.53	1	5	29
Dec. 19-19	L. E. Doan Cash	5,000.00	1	2	12
Dec. 31-19	L. E. Doan Cash	10,000.00	1	2	
Mar. 23-20	L. E. Doan Cash	14,498.57		9	8
" 23-20	L. E. Doan Charge	501.43			
	Automobile	2,665.00			
		<u>\$311,665.50</u>			<u>34,576.54</u>
	Deduct total				
	receipts as on	218,587.50			25,427.24
	next sheet following				
	Balance	<u>93,078.00</u>			<u>\$9,149.30</u>

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RECEIPTS OF L. E. DOAN, TRUSTEE FOR DOAN, TITUS AND LUCY, PRIOR TO SEPT.
1, 1919, SUBSEQUENTLY TAKEN INTO ACCOUNTS OF DOAN OIL COMPANY.

Deposited in 1st Nat'l of
Fort Worth.

Date Paid 1919	Payee	Amount Paid	Interest computed to Mar. 1, 1921, at 7%			Interest
			Yrs.	Mos.	Days	
Apr. 1	Louis Titus	\$10,000.00	1	11	—	\$1,341.71
" 6	" "	10,000.00	1	10	25	1,331.99
" 22	Gatch & Morris	5,000.00	1	10	9	650.42
May 15	1/2 Int. in sale of Oklahoma Lease	3,530.00	1	9	16	443.40
" 23	Louis Titus	10,000.00	1	9	8	1,240.59
" 27	" "	10,000.00	1	9	4	1,232.82
June 10	Oklahoma Lease	5,387.50	1	8	21	650.56

Deposited in 1st Nat'l. Bank of Shreveport.				Interest computed to Mar. 1, 1921, at 7%			<i>B. T. Dyer.</i>		341
Amount Paid	Yrs.	Mos.	Days	Interest					
25,000.00	1	8	14	5,969.45					
25,000.00									
10,000.00	1	8	12	1,190.01					
15,000.00	1	8	4	1,761.67					
20,000.00	1	7	16	2,278.89					
24,670.00	1	7	16	2,811.01					
10,000.00	1	7	9	1,125.83					
20,000.00	1	6	19	2,173.89					
5,000.00	1	2	—	1,225.00					
5,000.00									
2,500.00									
2,500.00									
<hr/>									
\$218,587.50									\$25,427.24
<hr/>									
Total Receipts									
1919									
June 17	Louis Titus								
" 17	J. F. Lucy								
" 19	L. E. Doan, Jr.								
" 27	Louis Titus								
July 15	"								
" 15	J. F. Lucy								
" 22	Louis Titus								
Aug. 12	"								
Dec. 31	R. E. Doan								
" 31	C. E. Doan								
" 31	H. A. Doan								
" 31	N. E. Doan								
<hr/>									
Total Receipts									
[267]									

Thereupon, the following proceedings were had before the Special Master:

Testimony of L. E. Doan, for Plaintiff.

L. E. DOAN, called as a witness for the plaintiff, testified as follows:

My account was prepared by myself and by my bookkeeper, the bookkeeper of the Doan Oil Company, J. B. Stephens. He is at Shreveport. The account was typewritten here in San Francisco and verified by an accountant here. At Shreveport we had the assistance of a certified accountant, Mr. Maguire. I made up the account from my personal books, check-books and stub-books and books of the Doan Oil Company and also from my cash-book. I have them all here, including the cash-book. That is a personal book which I have kept for years. I have no partnership books whatever, because I never knew there was a partnership. The only book I have is that, the personal cash-book which I have in San Francisco. The Doan syndicate deal referred to in this account refers to the Santa Maria properties referred to on the trial. I delivered to Dyer an accounting of the Santa Maria property several months ago, I think before this suit was started. It was a statement made up by Maguire and was a summary taken from the books as kept by McLean. I didn't give Dyer an itemized statement of the Santa Maria operations, that is, the receipts and disbursements. My account has an item of \$553.47 which is additional to the \$6,000 referring to the Santa Maria properties. That was one-fifth of the balance after wrecking the

(Testimony of L. E. Doan.)

property and paying all the bills. I don't recollect the amount of my original subscription to the Doan Oil Company. I think there was three hundred thousand shares in the first capitalization and I subscribed to one-third of it. I do not remember exactly how the stock was issued. Thegpen was the attorney for the Doan Oil. Raymond was employed by it as a geologist. They were original subscribers, I think, each for [268] one thousand shares, issued to them to qualify them as directors. They purchased the stock and paid for it, but the money was paid back to them. The stock issued to them would belong to me. I held one hundred thousand shares, I believe, at the outside.

When I prepared this account I was purporting to state fully therein the total number of shares of the Doan Oil Company that had been issued to me, or the number I own to-day. I was attempting to show the number of shares of stock that would be owned by the firm of Doan & Dyer, provided the Court sustains the judgment, that is all. I was trying to show the partnership amount. By the item "Statement of Assets 93,000 shares of stock of the Doan Oil Company, I mean I put in \$93,000 in cash for \$93,000 shares. I turned in salary for the other 7,000 shares. The Doan Oil Company voted me a salary of \$7,000 back salary for services rendered. I do not remember the date of that. I am not certain that the minutes state anything about back salary, but Titus agreed with me that I would draw a salary from the time I started operations, which was several months before the Company was

(Testimony of L. E. Doan.)

organized. That first came up at a meeting at Shreveport when Lucey and Titus were present. I do not remember the month. It was 1919. I have the book of the Doan Oil Company here. The work I did before the organization of the Doan Oil Company was acquiring properties, leases, etc.; some of them were turned over to the Doan Oil Company and some of them are still standing in my name as Trustee. They all belong to the Doan Oil Company. The Company has a record of all the properties that they own, as is shown by their books. The Company has on file a letter from me stating that I am trustee of those properties. [269]

The only consideration I received from the Doan Oil Company was paid me in stock, just what the properties cost—stock at par. The Doan Oil Co. books will show the amount of stock issued to me in consideration of my turning over these leases and properties. Before the Doan Oil Company was organized Titus had sent me money and also Lucey and I carried that in my account as trustee for the three of us. When the Doan Oil Company was organized all prior transactions were transferred to the Company and there was a big balance of money in my hands, more than my individual share, and stock was issued for that money and part of that was issued to Titus and part to Lucey and part to myself, so that I did not get all of the stock that was issued as the result of the properties that I held at that time. The 93,000 shares include a part

(Testimony of L. E. Doan.)

of the stock was *was* issued against leases. The stock was issued to me and to Lucey and to Titus according to our *pro rata* share of the net amount of money that was turned over. I could not say the proportions of the stock issued without reference to the books. Each one of us was to receive stock in proportion to the amount of money we had invested at that time. The Burke-Burnett property was turned over to the Doan Oil Company at \$40,000, and for that the company issued \$40,000 worth of stock at par. Some of the money I put into that property belonged to Lucey and Titus, but they got stock for that. I did not lose anything on it.

My salary from the Doan Oil Company was \$1,000 a month. My account does not include items of expense in connection with the Doan Oil Company properties. Every item in my account I was given credit for by the Doan Oil Company. They issued stock for it. The 93,000 shares is all the stock I ever received from the Doan Oil Company except the \$7,000 I testified to from my [270] personal salary. I have that in stock, yes. That was issued to me at the same time as the other stock. The statement of issues of stock for the Doan Oil Company prepared by Mr. Stephens and now shown me is, I believe, correct. The first three items are as follows:

L. E. Doan, Certificate No. 1, 50,000 shares, June 27, 1919;

L. E. Doan, Certificate No. 2, 25,000 shares, June 27th, 1919;

(Testimony of L. E. Doan.)

L. E. Doan, Certificate No. 3, 23,000 shares, June 27th, 1919.

I think those 98,000 shares were issued at that time. I think the list is correct. Also on this statement is the name Thegpen, certificate No. 9, 1,000 shares, **on the same date**, and also S. S. Raymond, Certificate No. 10, 1,000 shares on the same date. Those 2,000 shares of stock were also mine. That would be one hundred thousand shares issued and belonging to me on the 27th day of June, 1919.

The resolution fixing my salary at \$1,000 a month was not adopted until some months after the organization of the Company, but I had already paid for this stock in cash and it was simply a matter of bookkeeping, and I assumed I had the right to take 7,000 shares of stock from my own salary for my own use in case the judgment was affirmed. The Doan Oil Company never paid me interest on the balance which I paid out in connection with the acquisition of those properties. It is not a fact that I agreed with Dyer that we would each put in a two months' expense account to the Doan Oil Company at \$500 a month. Dyer sent me such a statement. I told Dyer to make up a statement [271] showing the actual expenses he was out in connection with the properties he acquired and which the Doan Oil Company took over. He sent me down a statement for \$500 without itemizing it. I think it was two months.

The automobile I turned over to the Doan Oil Company and they gave me credit for the full

(Testimony of L. E. Doan.)

amount. The \$2,000.00 covered there on behalf of the owner of the automobile was turned in to the Doan Oil Company.

When I turned the whole thing over to the Doan Oil Company as a corporation there was \$93,000 net balance as the net amount of money I had paid into the Doan Oil Company in cash. I got a hundred thousand shares, but that included \$7,000 salary. The \$93,000 represented my net cash investment in the Company.

The Considine-Martin Oil Company—there were 30,000 shares originally issued to me of which 15,000 shares belonged to J. E. Terry. That 15,000 shares were turned over to him and transferred to him. I do not know whether it has been transferred on the books of the Company, but I know that I gave him all the certificates for his 15,000 shares, but I still have 15,000. It is not a fact that but 10,000 belonged to Mr. Terry. As to any writing between Mr. Terry and myself evidencing our respective ownerships, I think I have a letter, but Terry is here and you can have him testify, if you want him. I believe I have a memorandum signed by Terry in which I advanced \$2,666.99. He gave me his note for half of that. I agreed to turn over half the stock which I acquired from the Considine-Martin Oil Co. when I acquired that note and he paid it back to me. As to the amount of refund, to wit, \$2,666.66, when the company was financed they paid back the original promotors and I got that back. I got a refund on the amount of stock against

(Testimony of L. E. Doan.)

me, but I put up the money in the first place. I got it back from the Company. Terry came to me one day and told me he would like me to advance him \$2,666.66 to go into the Considine-Marine Oil Company. He explained to me what it was. I told him all right. He said [272] "I will give you half of the stock that I get in the Company if you will advance me \$2,666.-66," and he paid me back half of the money. He paid me back half of the money and the stock was eventually issued, 30,000, all in my name, and I turned over half the shares to him. I did not return all the money I received because I put up the money. Terry agreed to pay me the money, to wit, half of \$2,666.66, in the event I did not get it back but if I did get it back it squared the account with him. I got the money back that Terry owed me and the debt was cancelled. He did not personally pay me back any money on the Considine-Martin stock. All the money I got was the \$2600 from the Company. I put the money up in the first place and I got it back. I now have 15,000 shares of Considine-Martin stock. I have never transferred a share of it. It still stands in my name on the records of the Company. I never owned any other shares of stock in that Company.

I remember a resolution being adopted by the Board of Directors of the Doan Oil Company in November, 1919, providing in substance that the Company offer for sale one hundred thousand Shares of stock at par, or one dollar a share, payable on

(Testimony of L. E. Doan.)

certain terms described in the resolution, the stock to be first offered to the stockholders. 50,000 shares would be offered to Titus, 333,333 to L. E. Doan, 16,666 to Lucey. If any stockholder failed to take up such stock the Board of Directors would decide without further action what would be taken with reference to the disposition of it. Those shares of stock were not issued to or taken up by the persons named. Titus took some of his, 50,000 shares, and has some of it transferred to other parties; Lucey the same. I do not know whether I did or not take any part of the 33,000 shares, but I know that I never had any more [273] than the number of shares I have already mentioned. I think I took some of the stock—I sold some of it. That is, I didn't have the money to put up for it, so Morris put up \$5,000, my sisters \$5,000, my brother \$5,000 and my nephew \$5,000. That is the way the stock was divided up. I think the entire lot of 33,000 shares was issued to my nominees. They were not all relatives of mine. S. S. Raymond got 10,000 shares. He paid for his own stock in his own money. I had no understanding or agreement from him about taking that stock over from him. My brother and sisters and nephew took 15,000 shares. The names of my sisters are H. A. Doan and Mary Elizabeth Doan. Each got 2500 shares. R. E. Doan is a nephew of mine. He got five thousand shares. He paid for them, I didn't advance a cent. I had no understanding or agreement whatever with him that I am to get

(Testimony of L. E. Doan.)

that stock or any part of it. C. E. Doan is my brother. He got 5,000 shares and paid for it and the stock was issued to him. My sisters paid for their own stock. L. E. Doan, Jr., is my son. I advanced \$10,000 to him out of my personal fortune and gave him 10,000 shares of stock. I think that 10,000 shares was transferred to him about the time this other stock was issued. I think it was originally issued to me and then transferred. I told my son that I was going to give it to him. The stock was issued to me and I didn't take it until sometime afterwards. I had in mind giving it to him when we first organized the Doan Oil Company.

The Doan Oil Company stock at that time, November, 1919, had no market value. There never has been any market value. There was never any stock sold that I know anything about. I have never fixed a value on the stock of the Doan Oil Company. At that time I don't think it was worth any more [274] than par. Of course it had a speculative value, but not an actual value because the property had not been developed. Like all oil properties the Doan Oil Company's stock has always been speculative, and it is, even at this time because we have not completed the drilling of the wells that may determine the value of the property. You never know the value of an oil company until the drilling is complete. We are drilling wells now on the Pine Island property. If they are failures the stock will not be worth much, but if

(Testimony of L. E. Doan.)

they are successful the stock will be worth a lot of money. My son never sold any stock issued to him in the Doan Oil Company. I don't know of any stock ever having been sold. My son didn't pay for the stock that was issued to him. It was my own money. The Doan Oil Company has had transactions with the General Petroleum Company. It had an option to purchase the Pine Island property. An option from Titus and myself personally to purchase some stock. That was personal stock of myself and Titus. Lucey is not concerned in that. It is all one option. Titus and I personally signed the option and guaranteed the delivery of the stock. Titus and I will be personally obligated to deliver our stock if the option is exercised. The option was some time in April of last year (1920). The General Petroleum Company paid both money and stock for that option. They paid \$50,000 in money, which was paid to Titus and myself. Out of that I received altogether \$12,500, Titus got the rest. I don't know, but I think he divided up *pro rata* with the stockholders, to whom he had transferred some of the stock. That did not include myself. Titus told me at the time the money was paid that under his construction of this contract, we didn't have to pay any of this money to the stockholders because he and I were personally guaranteeing the delivery of this stock. [275] Titus and I guaranteed to deliver 200,000 shares of stock of the Doan Oil Company to the General Petroleum Company. I had no agreement as to how much of this stock

(Testimony of L. E. Doan.)

each was to put up. The \$12,500 that I received was based upon the proportion of stock that I own. That is, one-quarter. At that time I considered that I owned 100,000 shares of the Doan Oil Company, and that was one-quarter of the issued stock. My brothers and sisters got some of this \$50,000—everybody got some of it. The General Petroleum Company paid 1,000 shares of General Petroleum stock on this option. It was transferred to Titus and myself. It was 1,000 shares of the par value of \$100 that was taken over at the price of \$200 a share. I got one-quarter of that stock, or 250 shares. The \$50,000 and the 100,000 shares of stock are to be forfeited if the General Petroleum does not exercise its option. If it exercises its option, it pays a total of \$2,000,000 of the book value of their stock. In other words, an additional sum of \$1,750,000. They are to pay that in cash or stock, at their option. That goes to the parties who deliver the 200,000 shares of stock. Titus and I agreed to deliver that stock. The stock on which the General Petroleum Company has an option has not been escrowed. We have merely guaranteed delivery, and they have taken our word for it. I have given Dyer no credit for any portion of that \$12,500 in my account. The quarter of that stock has been transferred into my name on the books of the General Petroleum Company. I have given Dyer no credit for any part of that stock. So far as I know, all the stockholders got a *pro rata* share of the General Petroleum stock, although

(Testimony of L. E. Doan.)

as I say, Titus took the position as a lawyer, that we were under no obligation to do it under the contract. I was entitled to 250 shares of the [276] General Petroleum stock, but 248 shares were issued to me in order to adjust the balance between Titus and myself. I sold him two shares of this stock at the market price, I think it was \$130.00 or \$134.00. 248 shares now stand in my name. I also received \$12,500 in cash. The Doan Oil Company had a subsidiary corporation, called the Ray Drilling Company. I owned no stock in that company; it belongs to the Doan Oil Company.

There were no agreements whatever between Lucey, Titus and myself with reference to the allotment of stock in the Doan Oil Company. I have charged interest in my account on all the amount of money I have put in and I have given credit for all other amounts which I have received from Titus and Lucey and other sources, etc., outside of my own, so that the difference represents the net amount of interest that is chargeable to Dyer.

The General Petroleum option is all covered in one document. It had an option either to buy 200,000 shares of stock of the Doan Oil Company, or in lieu thereof to purchase the so-called Pine Island property. 200,000 shares would represent half of the issued stock of the Doan Company. We have no agreement with other stockholders of the Doan Oil Company that if the General Petroleum elects to take the stock, that they are to contribute from their holdings. We have from a few,

(Testimony of L. E. Doan.)

I don't know how many it is, just a verbal talk, no contract. This verbal talk extended to Lucey, also to my brother and sisters. I don't know whether I mentioned it to them, but they know about this option. There is no contract with anybody, we simply distributed some of the money to these stockholders and wrote them and told them what the agreement was, but nobody was pledged. They could dispose of their stock and get rid of it, and Titus [277] and I would have to deliver the stock just the same. Titus and I hold at present 200,000 shares of stock. I hold 100,000 shares and Titus either personally or by the East Side Investment Company, holds, 173,500.

Certificates 12, 13, 14 and 15, for Doan Oil Company's stock, aggregating 23,000 shares, issued to me under date of December 2d, 1919, were in place of certificates for 23,000 shares which was cancelled. There is an item in my account December, 1919, "Cash L. E. Doan, \$5000." That is \$5,000 that I put into the Doan Oil Company—that was \$5,000 that was sent to me by my brother and sisters. There was \$15,000 which was sent to me at that time, for the stock that was issued to them. I deposited the amount to my account and issued a check to the Doan Oil Company. That was to purchase stock for my brother and sisters. They sent me \$15,000 at that time. They sent it to buy stock for them. The stock was issued directly to them. At the time the stock was issued to my brother and sisters, I had not loaned or advanced any money,

(Testimony of L. E. Doan.)

to any of them. At that time none of them owed me any money. Subsequent to that, I have had no financial transactions with them whatsoever. The stock still stands in their names. They were my nominees. I think I suggested to them that they take this stock. I don't recollect whether I wrote them about it, or whether I talked to them about it when I was in California. They were anxious to put the money in, and I didn't have the money myself, so I took their money. In fact, I borrowed quite a lot of money I put into the Doan Oil Company myself. I didn't borrow any of the money I put into their stock. The money I borrowed for myself I borrowed from banks. I did not borrow any money from them, I borrowed it from outside. They are [278] residents of Stockton, California. I cannot tell you exactly when I first took up with them the taking of this stock, it was some time during 1919, a little before the stock was put up. I told them I thought they could get some of the stock. When the issue was definitely provided for, I notified them that the stock was available. I think I wrote them with reference to it. I had a letter from my brother enclosing the checks. This is a copy of it, which my brother handed me the day before yesterday. It refers to telegrams being received. I presume I wired them that the stock was available at that time. I will secure the originals of the correspondence. My brother Charles resides in Stockton. He is official Court Reporter there. My brother and sisters bought

(Testimony of L. E. Doan.)

the stock and paid for it just the same as I paid for mine. There is no contract to sell it back to me or anything of that kind, it absolutely belongs to them. It is also true of all other relatives who got any of this stock.

I did not notify Dyer at the time this stock was issued, that he could get any of it. Dyer already owed me a lot of money and I didn't consider he had any interest in it whatever. I don't consider him my partner. I didn't put him in touch about it, nor attempt to do so.

The resolution of the Board of Directors provided that I be entitled to 33,333 shares of that 100,000 shares provided for at that meeting. All of the 33,333 shares were issued. My brother and sisters got \$15,000 worth—that would be 15,000 shares. S. S. Raymond got a portion of it, I think 3,333 shares. Morris and his partner got 5,000 shares between them. Morris was Vice-President of the Central National Bank at Oakland. Morris is now dead. His partner's name is Gatch. They each got 2500 shares. They sent me the money April 19, 1919, [279] I don't know who got the other 10,000. The books will show. Raymond, our geologist, got 10,000 shares, a part of which would come out of my allotment. Gatch and Morris sent me the money and I put it into the Doan Oil Company.

Plaintiff hereupon introduced in evidence a statement under the signature of J. P. Stephens, Secretary of the Doan Oil Company, under date of November 18th, 1920, which is as follows:

(Testimony of L. E. Doan.)

“Following are the names of the original organizers of the Doan Oil Company, Inc., together with the amounts contributed to the original capital of the corporation, which sums were paid in cash; no property or other assets were turned over to the Doan Oil Company, Inc., for stock, other than stated minutes meeting June 27th, 1919.

NAME.	AMOUNT.
L. E. Doan.....	\$ 98,000.00
Louis Titus	150,000.00
J. F. Lucey.....	50,000.00
J. A. Thigpen.....	1,000.00
S. S. Raymond.....	1,000.00

“The above is a true and correct statement of the facts, which are shown by the books of the corporation.

J. P. STEPHENS, Secretary. (Seal)

Shreveport, La., Nov. 18, 1920.”

Morris and Gatch's stock were issued in the name of L. E. Doan, Trustee, for this reason; I had loaned Morris' son \$5,000 and his father left the stock with me as security. I afterwards issued Gatch his 2500 shares and the 2500 shares [280] of Morris' still stands in my name as Trustee on account of that security proposition. I made the loan at his father's request. He paid off the loan since I arrived in San Francisco on this trip, and I will send him the stock as soon as I return to Shreveport. That stock participated in the money and stock that was paid by the General Petroleum. Morris got that.

(Testimony of L. E. Doan.)

Raymond paid cash for his stock. He paid the money to the Doan Oil Company direct. I never executed any formal assignment, or any assignment of any kind to Raymond, Gatch, my brother or sisters, or anybody, of any right to take the stock allotted to me, or any portion of it. The money was paid into the Doan Oil Company and the stock issued to them. I do not think there is any resolution providing for the issuance of the stock to anybody else other than the three people named in the resolution, namely: Lucey, Titus and myself. I simply instructed the Secretary of the Doan Oil Company to issue the stock and the money was paid in and the stock issued to them. I had no correspondence with Raymond with reference to the 10,000 shares issued to him. He was right there at Shreveport. He is no longer connected with the Doan Oil Company. I believe he is in Brazil. I advised him that the stock was going to be issued to him. He got the stock and paid for it. There is nothing in the minutes of the Board of Directors providing for the issuance of that stock to Raymond. I discussed the matter with Lucey and Titus, and it was agreed that he should have the stock. We never went through the formality of passing a resolution. Raymond got part of the \$50,000 in cash and \$200,000 of stock received from the General Petroleum Company. I paid him the money. It came into my hands and I paid him.

[281]

(Testimony of L. E. Doan.)

I told L. E. Doan, Jr., that I would put \$10,000 into the Doan Oil Company's stock for him, so I gave him credit for it, gave him credit June 19, 1919, as shown by my accounts. I told him I had purchased \$10,000 worth of stock for him in the Doan Oil Company, but it was not delivered to him until subsequently. I had many conversations with him. I told him that I would give him \$10,000 worth of stock in the Doan Oil Company as soon as it was organized.

With reference to the Considine-Martin stock, I didn't get 20,000 shares. I got 15,000 shares, no more. In the first place, the money went into the Anglo Trust Company. It was a trust certificate issued for 30,000 shares before the corporation issued any stock. The certificate was afterwards converted into stock of equal amounts of which half belonged to Joe Terry and half to me.

On the second of April, 1920, I transferred 10,000 shares of stock to L. E. Doan, Jr. Raymond got 10,000 shares and paid \$10,000. He got his *pro rata* amount of each one of the original subscribers. He was allowed 3,333 of my share. I didn't get anything for it.

At or about the time of the Burke-Burnett deal I think Titus had advanced me \$20,000 and then \$20,000 a little later. A portion of these moneys, I think, \$20,000 was used in the Burke-Burnett deal.

(Testimony of L. E. Doan.)

Cross-examination.

The directors voted me a salary and I had it credited to my account, \$7,000. That was paid in as part payment on the 100,000 shares of stock. There was no promotion stock issued by the Doan Oil Company at any time to any person. None of the additional stock issue made by the Doan Oil Company [282] pursuant to the resolution of November 10th, 1919, was subscribed by me individually, except \$15,000. That I would like to explain: The books show that I put in \$15,000 in March, 1920, on account of that issue of stock, but I had already received this \$5,000 away back in April, from Mr. Gatch, and I had already promised my son \$10,000 worth of stock, which had not been issued; so that stock was issued direct to them, instead of to me—that is, it was issued to me as trustee.

I first told my son, when I organized the Doan Oil Company, that I was going to subscribe for stock in the Doan Oil Company on his account. I think that was about June, 1919. I told him I was going to acquire for him an interest in the Doan Oil Company. The stock was subsequently issued to him in November, 1919. There was not, at that time, and there never has been, any existing account in the name of myself and Dyer. From November 10th, 1919, until March, 1920, there was never any such joint account, and I never had any funds belonging to Dyer on hand between those dates. During those dates I endeavored to secure money from Dyer. He owed me a balance of

(Testimony of L. E. Doan.)

\$6,000 on a personal matter, and I asked him for it. Later on, in January 1920, we talked the matter over and Dyer paid me \$3,000 at that time, and agreed to pay me the rest of the money the next day.

Redirect Examination.

That \$6,000 referred to the Doan Syndicate matter, the Santa Maria well. [283]

Testimony of Claud Gatch, for Plaintiff.

CLAUD GATCH, called as a witness for the plaintiff, testified as follows:

I have known Doan for five years. I have done business with him within the last few years. In 1919, about the first of the year, I was visiting Mr. Morris at Los Gatos and he said he was going in with Doan or going to assist Doan in some oil project, I think he stated, to the amount of \$5,000, and asked me if I would like to go in that with him, which I said I would. Morris and I borrowed the money. I sent him the amount by draft on New York City, which was payable to him and which he endorsed over to Doan. The date of the draft is April 16th, 1919. I have one or two letters from Doan, one is dated May 17th, 1920.

Letter introduced in evidence by plaintiff, the material parts of which are as follows:

“Shreveport, La., May 17, 1920.

“Mr. Claud Gatch,

Oakland, California.

My dear Gatch:—

I am enclosing you herewith Two Certificates of

(Testimony of Claud Gotch.)

Stock for Twenty-five Hundred Shares Doan Oil Company, Incorporated; also my check for \$1250.00, being Fifty per cent dividend declared on the Thirteenth of April, during my absence in California.

“Mr. Titus and myself made a deal with the General Petroleum Company of California, as owners of more than half of the stock of the Doan Oil Company, in which we guaranteed the delivery of one-half of the Stock of the Doan Oil Company, or in lieu thereof our 1110 Acre ease in the Pine Island District at the option of the General Petroleum Company. The General Petroleum Company have agreed to drill three wells at their expense on the Pine Island Property, and if the wells prove satisfactory they have the right to exercise the option at any time within eight months time from the Sixteenth day of April. They made a payment of Fifty Thousand Dollars in cash and One Thousand Shares of Stock of the General Petroleum Company as a bonus to be applied upon the [284] purchase price, and to be forfeited in the event of their failure to exercise the option. At the time we took this stock, the market value of the General Petroleum was \$150.00 per share, the book value is \$200.00, and it is actually worth Two Hundred Dollars per share. The balance of the purchase price \$1,750.00 will be paid in stock of the General Petroleum Company.

“Under the terms of this option, if you desire to join with us in the sale of our stock it will be

(Testimony of Claud Gotch.)

necessary for you to put one-half of your certificate in escrow pending the fulfillment by the General Petroleum Company. In that event there will be due you and Morris on your Five Thousand Shares of Stock a cash payment of \$625.00 and $12\frac{1}{2}$ shares of the General Petroleum Stock, or one-half of that amount to each of you—\$312.50 cash and $6\frac{1}{4}$ Shares of Stock—and as General Petroleum Company do not sell fractional shares of stock it will be necessary to make an adjustment on basis of the market value of the stock. In the event that you do not care to take this stock at all, either Mr. Titus or myself will take it off your hands at the market value. Please advise me your wishes, and if you desire to sell half of your stock on the same terms as the rest of us please return Twelve Hundred Fifty Shares of Doan Oil Company's Stock to be placed in escrow pending the consummation of the General Petroleum deal.

“I do not think there is any doubt about the final outcome of the deal. In the event of their failure to exercise the option we will be in the neighborhood of Three Hundred Thousand Dollars ahead, and will have all of our properties left. Our production is holding up remarkably well. At this time it is averaging about Seventeen Hundred Barrels per day with three wells nearing completion. We are selling the oil at \$3.15 per barrel at the well. We have \$140,000.00 in the bank, cash,

(Testimony of Claud Gatch.)

and owe nothing: so the Doan Oil Company is in a very flourishing condition.

“With kindest personal regards, I remain,

“Very truly yours,

“L. E. DOAN.”

If I remember right, I got 2500 shares of stock of this Oil Company. There were two certificates aggregating 2500 shares, that is, the first stock I have had in the Doan Oil Company. I had no stock that this took the place of in any other company. That letter of May 17th, 1920, was the first I heard from Doan directly, respecting that investment, unless we had conversations. [285]

Cross-examination.

I received this stock of the Doan Oil Company, and have held it ever since. I received a dividend from the Doan Oil Company, which I retained. I am Vice President of the Central National Bank and the Central Savings Bank at Oakland.

Redirect Examination.

I received \$1250.00 dividend on the stock. I have not yet got any stock in the General Petroleum Company. I have had nothing at all from the General Petroleum. It was intimated that I would receive some. Mr. Doan, in a conversation with me, said, “There will be some stock coming.” That was a few days ago. That wasn’t the first time I had heard of it. Morris told me that he had received some stock. Morris told me that a week or two ago.

(Testimony of W. B. Morris.)

Recross-Examination.

The letter of May 7th gave me information about the General Petroleum Company. The fact is, I have not paid much attention to the matter. [286]

Testimony of W. B. Morris, for Plaintiff.

W. B. MORRIS, called as a witness for the plaintiff, testified as follows:

I know L. E. Doan. I am in the Wholesale Electric Specialty business in Oakland. I have had some correspondence with Doan. I am certain my father had some correspondence with him, but I am unable to locate it. Most of the transaction was between Mr. Doan and my father, who were very good friends. My father died in June, 1920.

I was not present at any conversations between them. My father and Gatch had \$5,000 in the Doan Oil Company between them. My father had never received this *pro rata* of stock due to the fact that previous to this transaction with the Doan Oil Company, Doan had loaned my company \$5,000 on a note endorsed by my father. When the stock of the Doan Oil Company was issued, this stock was held by Mr. Doan as collateral on my company's loan. The note was paid the 1st of March this year. The same dividend that Gatch got was applied on this note of my company and then, as the letter will show, the note was finally cancelled by a cash payment by my company on the 1st of March. Doan still has the certificate. He was expecting to come out here; I simply sent him the

check covering the transaction with this letter, which would do me until Mr. Doan sent me the full papers in the case, which would be the cancelled note and the certificate of stock.

The letters referred to by the witness introduced in evidence on behalf of plaintiff are as follows:

(Letterhead of DOAN OIL COMPANY, INC.)
Shreveport, La., Sept. 4th, 1920.

“Mr. W. M. Morris,
316 12th Street,
Oakland, Calif.

“My Dear Morris: [287]

“Replying to yours of August 24th, which arrived here during my absence in Kentucky, I will state that the Certificate of stock belonging to your father in the Doan Oil Company is certificate No. 51, 2500 shares standing in the name of L. E. Doan, Trustee on the books. It is common stock, there being no preferred stock. * * *

“If it will be necessary for me to put in a claim against your father’s estate for the \$5000.00 note. There is a credit on the note of \$1250.00 cash, being a 50% dividend on the 2500 shares of stock, and also a further credit of \$312.50 cash payment by the General Petroleum for an option on behalf of the stock of the Doan Oil Company and a further credit of \$625.00 par value, of stock the General Petroleum paid us on account of the option of the General Petroleum. Please advise me.

“Very sincerely yours,

“L. E. DOAN.”

(Letterhead of DOAN OIL COMPANY, INC.)
Shreveport, La. Feby. 21st, 1921.

“Mr. W. E. Morris,
c/o Creighton-Morris Company,
Oakland, California.

“My dear Will:

“Much as I regret to call your note; on account of the many expenses and income tax, which I will have to pay this coming month, I am obliged to call it, and I shall be greatly obliged if you will forward me your check at your earliest convenience. As you know I am holding 2500 shares Doan Oil Company stock as collateral security. There has been paid on the stock a dividend of \$1250.00, also a cash payment by the General Petroleum Company of \$312.50. There is a payment of stock in the General Petroleum of six and a quarter shares which with dividends paid to date, figuring the present market value of the stock, will amount to \$832.50, allowing you interest of 7% on the \$1250.00 dividend payment from the Doan Oil Company, it will just offset the interest due to date on your note, so there will be a balance due me of \$2625.00.

“There has been a big slump here in the price of oil; the market price of crude oil has dropped from \$3.50 a barrel to \$1.65 a barrel. This will make a big difference in the revenue of the Doan Oil Company, and will have a big bearing on the deal of the General Petroleum Company. It is impossible to say at this time what that Company will do. They have not yet completed their drilling program

(Testimony of C. R. Stevens.)

and I am unable to state just what proposition they will make us. I am glad [288] to say, however, that the Doan Oil Company is in an excellent shape financially; we owe absolutely nothing; have \$60,000.00 in the Bank and even at the reduced price of oil, our income will be in the neighborhood of \$25,000.00 a month.

"I trust that you will not be inconvenienced in any way by my calling the note.

"With kind personal regards, I remain,

"Very truly yours,

"L. E. DOAN."

Testimony of C. R. Stevens, for Plaintiff.

C. R. STEVENS, a witness called on behalf of plaintiff, testified as follows:

I am Secretary of the General Petroleum Corporation and have been such since the Company was organized, since 1916. Our Company entered into a contract dated April 16, 1920, with the Doan Oil Company; also there was an extension of that dated in October, 1920.

These two documents were offered in evidence by plaintiff. Objected to by defendant on the grounds immaterial, irrelevant and incompetent, not within the issues of the case, and relating to a transaction subsequent to the termination of any partnership; the same objection having been made to all testimony relating to General Petroleum Corporation. Objection overruled and exception noted.

The agreement is as follows, omitting formal and immaterial parts thereof:

THIS AGREEMENT, made and entered into this 16th day of April, 1920, by and between the DOAN OIL COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, first party, L. E. DOAN and LOUIS TITUS, second parties, and GENERAL PETROLEUM CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of California, third party. [289]

WITNESSETH:

WHEREAS, first party is the holder of a lease on that certain piece or parcel of land situate in the Parish of Caddo, State of Louisiana, known and designated as its Pine Island Lease,

AND WHEREAS, second parties are the owners or control not less than fifty (50) per cent of the capital stock of the first party.

NOW THEREFORE, in consideration of their mutual covenants hereinafter contained, the parties hereto agree as follows:

1. First party hereby grants to the third party the right or option for a period of eight (8) months from and after the date hereof, time being of the essence unless extended as hereinafter provided, to purchase the lease to the property hereinabove described for the sum of Two Million Dollars (\$2,000,000), payable Fifty Thousand Dollars (\$50,000.00) in cash, and One Million Nine Hundred Fifty Thousand Dollars (\$1,950,000.00) in shares of the capital stock of the third party at Two

Hundred Dollars (\$200.00) per share, provided the option to purchase the stock of the first party hereinafter referred to has not been exercised by the third party.

2. Second parties hereby grant to third party the right or option to purchase fifty (50) per cent of the capital stock of first party for a period of eight (8) months from and after the date hereof, time being of the essence, unless extended as hereinafter provided, for the sum of Two Million Dollars (\$2,000,000) payable Fifty Thousand Dollars (\$50,000) in cash, and One Million Nine Hundred Fifty Thousand Dollars (\$1,950,000) in shares of the capital stock of third party at Two Hundred Dollars (\$200.00) per share, provided the option to purchase the lease extended in paragraph one hereof is not exercised by third party.

3. This party agrees to pay to second parties the sum of Fifty Thousand Dollars (\$50,000.00) in cash on the execution hereof, and Two Hundred Thousand Dollars (\$200,000) in stock of the third party at Two Hundred Dollars (\$200.00) per share, as soon as permission to issue said stock is granted by the State Corporation Commissioner of the State of California, this payment to apply on the purchase price in the event of the exercise of their option.

4. Third party is hereby granted the right by first party and agrees to enter upon the lands hereinabove described and drill three (3) wells thereon to such depth as will, to its satisfaction, test the oil producing prospects of said party. All of said work shall be done at the sole cost and expense of

third party, and shall be carried on in accordance with the terms of the lease covering said property.

[290] Third party shall have the right to use any oil, gas or water developed by it on said land, free of cost, in drilling said wells.

5. First party agrees to assist in such work to such extent as may be requested with its organization now in Louisiana but at the cost of third party.

6. It is contemplated that not more than ten (10) days shall elapse between the completion of one well and the commencement of the next well, and that the work of drilling shall be carried on with proper diligence, but if, by reason of causes not the fault of third party, the completion of said wells shall be delayed beyond eight (8) months, these options shall run until said wells can be completed.

7. Pending the exercise of the option to buy fifty (50) per cent of the stock of the first party, as hereinabove set out the party of the first part may declare dividends in its discretion, on its capital stock. In the event said dividends are declared, such dividends shall be received by the stockholders of said Company, but in the event the party of the third part exercise its option to purchase fifty (50) per cent of said stock, then the dividends paid on such fifty (50) per cent of said stock and said party of the third part shall be entitled to exercise said option by paying the net balance due after the deduction of said dividends in shares of the capital

stock of the party of the third part at the said price of two Hundred Dollars (\$200.00) per share.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in triplicate, the day and year first hereinabove written.

DOAN OIL COMPANY,

By (Signed) L. E. DOAN,
President.

LOUIS TITUS,
Vice-President.

(Signed) LOUIS TITUS.

L. E. DOAN.

GENERAL PETROLEUM CORPORATION.

By (Signed) JOHN BARNESON,
President.

C. R. STEVENS,
Secretary. [291]

The agreement of extension, dated the — day of October, 1920, extended the option referred to in the agreement of April 16, 1920, until the completion of two wells referred to in the latter agreement and in other respects modified the first agreement. No portion of the latter agreement is material to the issues involved herein.

The General Petroleum Company received a letter signed Doan Oil Company by Doan, in the handwriting of Doan. Plaintiff's objection thereto overruled and exceptions noted. The letter is as follows:

(Letterhead of LOUIS TITUS.)

General Petroleum Co.,
San Francisco Cal.

May 8, 1920.

Dear Sirs:—

This will confirm request that the 1000 shares of the Capital Stock of your corporation issued in accordance with terms of agreement between Doan Oil Company first party; L. E. Doan and Louis Titus second parties; and General Petroleum Corporation third party; dated April 16, 1920; be issued to the following individuals and corporation and in the amount set opposite the names:

S. S. Raymond	25 shares
L. E. Doan, Jr.	25 “
C. E. Doan	12 “
R. E. Doan	13 “
H. A. Doan & M. E. Doan	12 “
L. E. Doan, Trustee	13 “
(Total shrs.) J. F. Lucy	162 “
(Total shrs.) L. E. Doan	248 “
East Side Investment Co.	430 “
Louis Titus	10 “
Louis Titus, Trustee	50 “

(Signed) L. E. DOAN,
DOAN OIL CO.,

By L. E. DOAN, Pres. [292]

The stock of the General Petroleum Company was issued pursuant to this letter and in the names and the number of shares as appears in the letter.

Memorandum introduced by plaintiff showing the certificates of shares of common stock in General Petroleum Company which were issued May 3d, 1920, as follows:

	Certificate	Shares	Subsequent Transfer
S. S. Raymond.....	18168	25	Jan. 12, 1921
L. E. Doan, Jr.....	18169	25	Sept. 2, 1921
C. E. Doan.....	18170	12	
R. E. Doan.....	18171	13	
H. A. Doan & M. E. Doan.....	18172	12	
L. E. Doan, Trustee.....	18173	13	
J. F. Lucy.....	18174	50	Aug. 16, 1920
“	18175	50	Aug. 13, 1920
“	18176	50	Aug. 13, 1920
“	18177	12	Jun. 29, 1920
L. E. Doan.....	18178	13	
“	18179	10	
“	A 2981	100	
“	A 2982	100	
“	18180	25	

	Certificate	Shares	Subsequent Transfer
East Side Investment Co.....	A 2983	100	Feb. 23, 1921
" "	A 2984	100	" " "
" "	A 2985	100	" " "
" "	A 2986	100	" " "
" "	18181	30	" " "
Louis Titus.....	18182	10	
Louis Titus, Trustee.....	18183	50	Feb. 24, 1921
		<hr/>	
	Total	1000	

(Testimony of C. E. Doan.)

Above memorandum also showing that eleven persons who became shareholders in Doan Oil Company did not participate in the division of General Petroleum Corporation stock.

I had no further correspondence with Doan.

Defendant made a motion to strike all evidence introduced through the witness Stevens and all exhibits introduced while his testimony was being taken on the grounds already urged. Motion denied and exception noted.

Testimony of C. E. Doan, for Plaintiff.

C. E. DOAN, called as a witness on behalf of plaintiff, testified as follows:

I am a brother of L. E. Doan. I had a telegram from my brother as follows:

“Shreveport La., 12:18 P. M. December 19, 1919.

“C. E. Doan,

Courthouse, Stockton.

Can use yours, Roland's and the girls' money up to fifteen thousand dollars on January first. Wire what I can depend on.

L. E. DOAN.”

I also received the following telegram:

“Shreveport, La., Sept. 25, 1919.

“C. E. Doan,

Courthouse, Stockton, Calif.

Brought in well today, over four thousand barrels daily, two dollar oil. This makes things look very good for the Doan Oil Company. Please tell mother.

L. E. DOAN.”

(Testimony of C. E. Doan.)

I am a shorthand reporter in the Superior Court of San Joaquin County. I have stock in the Doan Oil Company. I received it about March, 1920. I paid for five thousand shares, [294] but I had two hundred shares of that issued to my daughter and the certificate for 4800 shares issued to me. My daughter's name is Parks.

In the same correspondence I received a certificate for 5,000 shares for my son, Roland E. Doan, and 5,000 shares for my sisters, Miss Hattie A. Doan and Miss Lizzie Doan. I think that my sister Lizzie took 3500, and my sister Hattie 1500. My certificate was issued in my name, my sisters' in their names, and my son's in his name. I sent a letter to my brother of which the following is a copy.

(Letterhead of C. E. DOAN.)

“Stockton, Cal., Dec. 26th, 1919.

“My dear Brother:—

Your telegram recd., and I am enclosing the following:

S. S. & L. S. Draft No. 8259 on Chicago	
for	\$1500.00
being Hattie's money.	
Union Safe Dep. Cashier's Check No.	
3895 for	\$3500.00
being Lizzie's money.	
Union Safe Dep. Cashier's Check No.	
3898 for	\$5000.00
being Roland's money; and	

(Testimony of C. E. Doan.)

Bank Italy Cashier's Check No. 44240,

for \$5000.00

being my money.

Total \$15000.00

You will note that one Union Safe Dep. Check is signed by E. C. Stewart and one by C. E. Stewart. They were obtained at different times. The one signed E. C. Stewart is signed by the President; the other is signed by D. E. Stewart, the son of E. C.

I do not know just how the girls want their stock made out, [295] whether for the amounts they have put in or whether an equal amount for each. They will write to you about this.

I have written to Roland about his, as to whether he wants it sent to him or sent to me and he will write you about that.

When issuing my stock, if you can do so conveniently and without any additional expense, I wish you would issue a certificate for two hundred shares to Irma (Mrs. Elbert C. Parks) and the balance to me. I promise her that much stock and if it can be issued that way please do so.

Roland's Certificate in Union Safe was made out to me, but I have endorsed same over to you. * * *

CHAS."

Cross-examination.

I think the first conversation I had with my brother with reference to the purchase of any Doan

(Testimony of C. E. Doan.)

Oil Company stock was some time in November, 1919, at Stockton. My brother stated that he thought they had a good thing down there and they were going to issue some more stock, and he would like to have us come in. He thought he could make some money for us, and when he got ready to get the money he would let us know. That is about the sum and substance of it. He let me know by the above telegram dated December 19, 1919. Roland is my son. Upon receipt of that telegram we sent these drafts in a short time. They are the drafts specified in the letter of December 26th, 1919.

The drafts introduced in evidence on behalf of defendant, and are as outlined in the letter of December 26, 1919. [296]

All told I paid my brother \$15,000 about the time of this matter. Of that amount \$5,000 was paid on my own account, the other \$10,000 was paid as follows: \$5,000 for my son Roland; \$5,000 for my two sisters. I paid my son's money at his request. He was in Pittsburgh at the time and he directed me to draw the money from the bank. He telegraphed me such directions.

The telegram introduced in evidence as follows:

"Pittsburgh, Pa., 10:40 AM. Dec. 23, 1919.

C. E. Doan,

Courthouse, Stockton, California.

I have wired Union Safe Deposit to deliver five thousand to you. Try and arrange, if possible so that I don't lose all interest on this amount, which

(Testimony of C. E. Doan.)

is payable January 1st. Please handle this investment for me and send money direct yourself.

R. E. DOAN."

A Union Safe Deposit Bank Book in the name of Rowland E. Doan shows that on December 26, 1919, a withdrawal of \$5,000 was made.

That is my son's bank-book. After this money was paid by me to L. E. Doan we received the certificates of stock from the Doan Oil Company. I think it is all in my safe deposit box in the bank. Just there as a convenient depository, so that it will be safe. Subsequent to the time I received the stock I received dividends from the Doan Oil Company. I received individually \$2400.00 That money I retained myself. I know that my sisters and my son also received a dividend and they retained the money. [297]

Redirect Examination.

In November, 1919, I had a conversation with my brother in Stockton about the Doan Oil Company. He said that it was a good thing. I believe he told me that they had authorized the issuance of more stock in the company. As I understood it, the stock was going to be issued. I understood we were buying the stock from the company. We were getting in on the same ground floor that he was getting in on, at the same price. He said he thought the future of the company was good. This conversation was prior to my mother's death, November 27th.

Testimony of L. E. Doan, Jr., for Plaintiff.

L. E. DOAN, Jr., called as a witness, testified as follows:

I am in the sporting goods business at Stockton; that is my residence. I am a stockholder in the Doan Oil Company. My stock was issued in April, 1920. The first conversation I had with my father about the Doan Oil Company was early in June, 1919. I think the corporation was formed about that time. He told me that I was going to have an interest with him in Louisiana or in Texas, or in all his oil deals. He didn't at that particular time say what interest it would be, but a little bit later I was told I was to get a \$10,000 interest. That \$10,000 interest was to be in the Louisiana Oil Operations. I subsequently did receive a \$10,000 interest in the Doan Oil Company. That was in April, 1920. I was in Shreveport at that time. I have the certificate now. It is in Stockton, in my possession. I have always retained the certificate since its issuance to me. I received dividends on the stock to the extent of \$5,000.00. I [298] invested those dividends in my own business.

Cross-examination.

My father either wrote to me or told me that I was to have an interest in the Doan Oil Company. Very possibly he wrote me. I do not believe I have any letters. I very seldom kept any personal letters. I knew a long time before I got an interest that I was to get it. I am not sure whether he wrote or whether he told me. I believe he did both.

(Testimony of L. E. Doan, Jr.)

We often talked about these things whenever I would see him; he often wrote me about them. He wrote to me and told me more than once that I was to get an interest in the Doan Oil Company. I don't remember whether he mentioned the exact \$10,000 part of it by letter or not. It was impossible for me to state what I wrote to my father respecting that transaction. I cannot recollect exactly what I said in regard to thanking him. I never asked him when I would get my interest. He never told me when I would get it, until I actually got it. That was in April, 1920. In April, 1919, my father talked generally about my having an interest in his operations, whether they were in Louisiana or Texas. He talked about it a great many times during May. We often talked about the possibilities down there. I remember as far back as November, 1918, having been told by my father that I would be taken in with him and given an interest in his oil operations in Texas. That was while I was in the service. I was discharged March 18, 1919.

My father purchased the stock of the North Texas Supply Company for me in June, 1919. I went to Wichita Falls and remained there until March, 1920, and then went over to Louisiana. I didn't see my father very early in June, until sometime in September. During that time the only way I [299] could have heard of these things was through his writing to me. I did see him in the early part of June. I may possibly have seen him

(Testimony of L. E. Doan, Jr.)

on one occasion when I went to Fort Worth, in August. I don't remember when I first heard the name of the Doan Oil Company. It was after it was organized. I was not told I was to get an interest in the Doan Oil Company before it was organized. My father I think first went to Shreveport in April or May. I believe he was first there in April and then went over with Titus in May. I never went to Shreveport until November.

Redirect Examination.

I have no brothers or sisters. My mother is not living. [300]

Testimony of B. T. Dyer, for Complainant.

B. T. DYER, called as a witness for the plaintiff, testified as follows:

I met Doan in San Francisco in November, 1919. We had a conversation as to the value of the Doan Oil Company stock. He told me it was worth from five to ten dollars a share. I made a proposition to him with reference to the Bull Bayou property; I offered \$800,000 for the eighty and forty acre tracts on behalf of the American Oil & Engineering Corporation. He said that he would not sell it for that. He had been offered a million and a quarter for the two pieces. They were known as the Pugh and Nelson leases. We talked about the Pine Island property. He said he thought that was the greatest lease in the district. He and Titus had both looked it over and thought it was a wonderful property, and thought that was where the big money would

(Testimony of B. T. Dyer.)

be, the Pine Island property. Along in the Summer after the \$2667.00 had been returned by the Considine Oil Company, he told me to make a note of that in my memorandum of account, that we had 20,000 shares as a bonus; that that had to be pooled with a bunch of other stock and would not be out of the pool until the following summer. We discussed the fact that we thought we could sell the interim certificates, or whatever you call them, or pooling certificates. I asked him if he thought it would be a good scheme to apply it on our Louisiana investment and he said that he thought that the income tax would be so big we had better leave it alone. I understand Terry was to get 10,000 shares, and Doan and I were to have 20,000. I did not hear anything about 15,000. Doan stated that to me. He handled that transaction. I had very little to do with it. I have filed an account here.

The account filed by the plaintiff is as follows:
[301]

“STATEMENT OF ACCOUNT BETWEEN B. T.
DYER AND L. E. DOAN.

DEBIT.

One half balance of expense, open account,

September 15, 1919, to March 22, 1920 \$337.32

Expense account April and May 1920,

\$500 per month. Presented at direc-

tion of L. E. Doan..... 1,000.00

Attorney fee paid Couch..... 25.00

One half of automobile account..... 1,332.50

\$2,694.82

(Testimony of B. T. Dyer.)

CREDIT.

One half amount received last 151½ acres

Oklahoma lease.....\$2,092.50

Balance due B. T. Dyer.....\$ 602.32

Interest not computed on above items pursuant to direction of the Special Master.

No figures or items are furnished on Louisiana properties or Doan Oil Co. matters or transactions for the reason that plaintiff has not personal knowledge of date from which such figures or items can be prepared. The same must be elicited from the account of defendant and the testimony produced upon the accounting.

No date is given with reference to the Santa Maria (California) transactions for the reasons:

Plaintiff has never received specific date concerning said matters, and this transaction was a California one and not involved in the partnership.

Plaintiff, however, concedes that there is due defendant thereon about \$3,000.00."

The item of \$337.33 was eliminated. The item of \$1,000.00 [302] was agreed on in a talk between Doan and myself. He said, "Well, make it about \$500 a month, and I think that will be all right," and I sat right down and made it out on a letter-head and mailed it to them, to the Doan Oil Company at Shreveport.

(Testimony of B. T. Dyer.)

Cross-examination.

The \$1,000 is a charge against the Doan Oil Company. Technically speaking, it is not against Mr. Doan individually. The items of that account is what Doan and I discussed and we lumped it at about \$500 a month. I have no vouchers for it outside of Western Union, club bills, and automobile. I cannot tell what those items are.

I subscribed to 10,000 shares of the North Texas Supply Company stock; I did not take that stock; I could not at that time. I did not pay for any stock in the North Texas Supply Company, except for a few shares, just enough to become an officer; I paid for those; I think that stock is in Los Angeles; I think there are ten or fifteen shares. I bought that stock and paid for it. The stock that I subscribed for and never purchased went to F. E. Couch. I got Couch and Owens to take it. They were friends of ours and we wanted them in. By we I mean Doan, Lucey and myself. Doan said that he wanted them in at the time of the organization. Both Doan and I talked to Couch about his taking the stock. That was in Fort Worth Club. I guess I made the final arrangements; I don't know where Doan was at that time. The final arrangement with Couch was that he simply took the stock that I was obligated for and they have got it now. The stock returned dividends; It paid one per cent a month while I was there and since I quit I think they paid 100% stock dividends and they are paying $\frac{3}{4}$ of a cent a month on the gross

(Testimony of B. T. Dyer.)

issue. I consider it pretty valuable stock. I think when I [303] left according to the books the stock was \$2.18 a share. Its par value is \$1.00. I made many offers to purchase stock of the Doan Oil Company to Doan. I told him that I was ready to put up my equal share with him at any time, and pestered the life out of him many times, because it was getting so big that I wanted to have it, that was all. But Doan told me, "Just let it ride the way it is." They were going to reorganize and were going to make a new company and turn this all in, where we would get our money back with some reasonable profit, and still control the new company; that was the general idea, but he wanted to keep the voting power in his hands.

I asked to purchase half of his holdings. I offered to pay one-half of what I owed him; if it had lost, there would not have been any argument about it. As to any arrangement to purchase that stock, I was going to borrow. As to the cost of borrowing, we did not have anything definite settled, but I stated that I would have to give Fleishhacker some of it. I went to him and it was absolutely understood—I asked him if I could get this money, and he said, "Sure, I will see you through it," but Doan did not want me to go to him. That is another thing he stated, he did not want Fleishhacker to get one penny in it. I went to Fleishhacker every time I came to town. I had a definite understanding with Fleishhacker that he would loan me sufficient money to purchase this stock from

(Testimony of B. T. Dyer.)

Doan. That was shortly after the Doan Oil Company was organized. I was to borrow \$50,000 from Fleishhacker, pay my half of the Doan third—for my one-sixth—Doan, Lucey and I were to have one-sixth apiece and Titus the other half. The conversation I had with Fleishhacker was the first time that I was back after the Doan Oil Company was organized. I went in and told him all about it. I think it was in July, [304] 1919. I am referring to Herbert Fleishhacker. I saw him in his office. I told him about Doan having picked up this stuff and they had made a \$300,000 pool, of which Titus had one-half and Lucy, Doan and I had the other half, and it looked awfully good, and my interests were to be \$50,000 for my half of the Doan end, and I wanted to know if I could depend on him if I had to have this—if I could depend on him to let me have it, and he said, "I have always taken care of you, you know that, and you certainly can." And I said, "I do not want any mistake about this, they may reorganize and turn this over shortly, but I have told Doan that I cannot go too far and keep pace with Titus if he is going too strong; but I understand this is the limit." And he said, "All right, you can depend on it when you want it." Fleishhacker will bear me out on that. As to his charge, I figured that I would have to give him about one-fourth. He did not fix on the price. I was going to give him one-fourth of the \$50,000 of stock if I had to get it. That was in order that I might have this \$50,000. I had subsequent conver-

(Testimony of B. T. Dyer.)

sations with Fleishhacker. Every time I came to town I would go down and talk to him. I cannot recall any direct conversation right now. As to my arrangement with Fleishhacker, what I thought I would have to do was to get this \$50,000 and buy the stock and then turn over one-fourth of the stock back to Fleishhacker. I told him that I would see that he got some of it, but he did not exact it from me. Before July he had given me a borrowing credit of \$50,000 individually. That was a couple of years prior to this. I had a pretty good borrowing capacity; I would wire him every once in a while—I would have a deal coming up and I would wire if I could get \$10,000 or \$20,000, and I would have a reply sent back with a draft. I always knew he was with me. [305] I never used those loans because Doan did not want me to get it from him. I had another source from which I could get this \$50,000. I arranged for it in New York with the American Oil Engineering Corporation. That was in December, 1919. Nothing was said as to how much I would have to pay them for the \$50,000. At the time of my letter of January 21, 1920, I had no definite understanding with Fleishhacker other than as I have testified to in July, 1919.

From the first of May, 1919, to April 1, 1920, I received a salary from the North Texas Supply Company. I also received a salary from the American Oil Engineering Company, which started in December, 1919. The North Texas salary was \$500 a month. I was also to get 10,000 shares of bonus

(Testimony of B. T. Dyer.)

stock when I made a success of the Company. I did not receive that stock. My first check from the American Oil Company was \$1,000, and along the first of 1920 they gave me \$1250 a month. I dissipated those salaries, spent it in expenses, living expenses, in every way. I had a credit of a limited amount established at the banking establishment of which Herbert Fleishhacker was President. I had once before a credit of \$50,000 that I could draw on. I had a definite arrangement with the bank which would have permitted me to have drawn \$50,000 without any further arrangement with the institution. That was prior to my going to Texas; Fleishhacker took me over to the note window and told the note man to give me anything I wanted on my note up to \$50,000. There was nothing said for how long a term that credit was to extend. That was in connection with a deal in Wyoming, which I was handling and financing and in which Doan was an equal partner with me. I went ahead and spent between seven and ten thousand dollars. I went to Fleishhacker; he took me over to the window [306] and told the man to give me anything I wanted up to \$50,000, and I said, "You were to finance this," and he said, "Well, that is all right, let it ride that way." So I dropped the matter.

As to the other conversation with Feishhacker in July, 1919, I told Fleishhacker that Larry and I had gotten into something over there and it was going to take a lot of money, it apparently was very good, as Titus was going in and Lucey, and my in-

(Testimony of B. T. Dyer.)

terests were \$50,000, \$1 a share for 50,000 shares, but I did not know that I was going to need it or not, but I wanted to know definitely if I could have it if I needed it, I did not want any mistake about it, and Mr. Fleishhacker said, "Why, yes, I have always taken care of you, and you can absolutely count on it." Nothing came up as to my giving the bank any collateral. I don't think that at any time that he arranged definitely that I could draw or put my note in for that amount. I don't think we went that far, but later on I wired him a time or two to know if I could get \$20,000 and he wired back to attach my note to the draft. Doan never to my knowledge or recollection went over to Fleishhacker's institution with me to arrange for a \$5,000 credit for me.

Redirect Examination.

As to my statement to Lucey that I had no money to put in the North Texas Supply Company, I had no money to put in the supply business; I had never made any arrangement for getting money for any mercantile business. I could get money for the oil business. I had never made any arrangements to get into the supply business, financially.

Recross-examination.

I never had a firm commitment in writing from Doan that I [307] could sell the Bull Bayou and Pine Island properties. No other person ever made an offer in writing to purchase those properties. I had a verbal offer from Mr. Seaton

(Testimony of B. T. Dyer.)

Porter and Hobart Porter. They told me that I could purchase it from Doan for \$800,000. That was the 80 and 40-acre piece in Bull Bayou. They never spoke of any other property of the Doan Oil Company. I do not recall any other person telling me that they would purchase any of this property. They told me that on one trip to New York in October or November. They did not state anything with reference to terms of purchase. They had not personally examined the properties. They had someone down there that had reported to them on it. I do not know who that was. I might have helped to fix that price because I knew Doan had told me that he had been offered three-quarters of a million; I don't recall by whom. When they told me to go ahead and negotiate the purchase for \$800,000, I both wired and wrote Doan that I had something of importance, I wanted to see him. That was the latter part of November at the Palace Hotel here. The conversation with Porter was about a month or six weeks prior to that.

Redirect Examination.

Wynn Meredith was one of the Vice Presidents of the American Oil Engineering Company at that time. He was cognizant of this authority to negotiate. His office is in the Nevada Bank Building, San Francisco. Hobart Porter was President and Seaton Porter was Vice-President of the company.

L. E. Doan, Recalled in Rebuttal on Behalf of Defendant.

I never made any statement to Dyer with reference to the Considine-Martin properties. I never stated to Dyer at any time [308] that we were entitled to 20,000 par value of the Considine-Martin stock; I never did, because I never had 20,000 shares; I never was entitled to 20,000 shares. I made a loan to Terry of \$2666.67, which was a part of the option price that the Syndicate paid on this property, with the understanding that whatever stock Mr. Terry received as a result of this \$2667 invested, that he would split equally. Terry agreed to pay me back half of this money. Later on, on the reorganization of the company there were 30,000 shares of stock issued to me as a result of that—we were entitled to that proportion of the bonus stock—Terry did not want to carry the stock in his name at that time so he had it all put in my name, every bit of it, and I afterwards assigned 15,000 of the certificate over to him, Mr. Terry, and I still have 15,000 left. In addition to the 15,000 shares of stock that Mr. Terry received, he also received a bonus of a number of thousand shares, I don't know how many, for compensation, because he devoted his whole time to the promotion of this company and he and several others were voted an additional bonus, which I did not participate in at all, had nothing to do with whatever. All I got was the stock that I paid for. I never have owned a share of stock in the Con-

(Testimony of C. W. Durbrow.)

sidine-Martin Oil Company in excess of the 15,000 shares.

Testimony of C. W. Durbrow, for Defendant.

C. W. DURBROW, a witness called in behalf of the defendant, testified as follows:

I am the attorney for Joseph E. Terry. I have been since June, 1918. Terry upon many occasions has requested me to handle transactions for him at San Francisco outside of my work for him as attorney. He asked me as a favor if I would arrange to obtain [309] for him from the Anglo-California Trust Company a certificate which had been issued, entitling him to 15,000 shares of Considine-Martin Oil Company stock and have those certificates of stock issued in the following: C. W. Durbrow, 2500 shares; R. W. Landon, 2500 shares; John W. Considine, 1250 shares; E. C. Weinrich, 250 shares; L. E. Doan, 500 shares; L. E. Doan, 8 certificates, each of 1000, 8000 shares, making a total of 15,000 shares, and requesting me to keep his name out of the transaction for the time being.

Pursuant to that request, I went to the Anglo-California Trust Company and had certificates issued in the amounts and on behalf of the parties named by me. These certificates were delivered to me, and by myself to Mr. Terry. I sent them to him. In August, 1920, Mr. Terry asked me if I would act as trustee for Dr. W. B. Coffey and Dr. W. I. Terry, stating that he was indebted to the

(Testimony of C. W. Durbrow.)

doctors, and wished to have shares of the Considine-Martin Oil Company placed in my name as trustee, to hold for their use and benefit until his indebtedness had been repaid. Pursuant to that request, 10,875 shares of stock of the Considine-Martin Oil Company were issued to me in my name, and I hold that stock under a declaration of trust for and on behalf of Dr. Terry and Dr. Coffey. On April 13, 1920, I executed a declaration of trust, addressed to Dr. W. B. Coffey and Dr. Wallace I. Terry, I hold in my possession escrow certificate No. 26 representing 8,375 shares of the Considine-Martin Oil Co. issued in my name as trustee this day in trust for Wallace I. Terry and W. B. Coffey, and for their use and benefit. Dated San Francisco, April 13, 1920, signed C. W. Durbrow.

On April 21, 1920, I addressed a communication to Dr. W. B. Coffey and Dr. Walter I. Terry, evidently in error, it should be Wallace I. Terry, which reads: [310]

“I have received from Anglo-California Trust Company certificate No. 27, which I hold in trust for the use and benefit of Walter B. Coffey and Walter I. Terry”—“Walter” being an error, as far as Terry is concerned—“acknowledging that they received certificate No. 240 for 2500 shares of stock of the Considine-Martin Oil Company standing in my name, to be delivered under the provisions of resolution passed by the board August 26, 1919.”

I now hold in my possession and in my name,

(Testimony of C. W. Durbrow.)

certificate No. 240, 2500 shares, certificate No. 26, for 8375 shares, covered by a declaration of trust later executed, a copy of which I could not find in my files, which is supplementary of the agreement to which I have referred.

Cross-examination.

I did nothing but carry out the instructions of Mr. Terry. My instructions were partially in writing, but most were given to me by Terry in the presence of Dr. Coffey at my office. I got written instructions from Terry to go and get 15,000 shares of stock. I have that letter.

The following letter introduced in evidence:

“Bowling Green, Ky., September 2, 1920.

“Mr. C. W. Durbrow,

65 Market Street,

San Francisco, Calif.

“Dear Mr. Durbrow:

“I am handing you herewith in this registered letter certificate number 244, for 1000 shares of the Considine-Martin Oil Company, in favor of L. E. Doan and indorsed by him in blank.

“Please have this certificate exchanged for four certificates [311] in favor of Charles A. Miller, each certificate for 100 shares.

“One (1) certificate of 500 shares in favor of Chester R. Gordon,

“One (1) certificate of 100 shares in favor of yourself.

"Kindly pay the charges incident to this transfer, advising me of the amount, which I will remit to you; inclosing stock book stubs for signature and return to the company for Charles A. Miller and Chester A. Gordon, on which, when they sign, I will have them put their addresses, and together with the new certificates register letter them to me in care of the First National Bank, Shreveport, Louisiana.

"Please mail carbon of your letter to me here at the above address.

"Thanking you in advance for your attention to this matter, I beg to remain,

"Yours very truly,

"J. E. TERRY."

Here is a letter bearing upon the subject which I assume you would like to have read:

HOTEL YOUREE.

Market Street, Texas to Travis.

Shreveport, La.

Phone 4300.

April 24th, 1920.

"Mr. C. W. Durbrow,
65 Market Street,
San Francisco, Calif.

"Dear Mr. Durbrow:

"Your favor of the 16th arrived this morning, having taken eight days to make the trip, which ordinarily requires only four days. I note you

(Testimony of C. W. Durbrow.)

have at last succeeded in getting a transfer of the certificate of trust of 8375 shares of the Con-sidine-Martin Oil Compay I sent you and that the [312] Trustee Mr. Cordrey advises you he hopes to have the 2500 shares out of the 15,000 shares I sent by Mr. Doan transferred in a few days. Why they have made so much delay about transferring these certificates I don't understand and if you find out would be pleased to have you advise me at your convenience. I also note contents of carbon of your acknowledgment of trust to Dr. Terry and Dr. Coffey."

"Instructions to get the 15,000 shares of stock are contained in the following telegram, dated April 1, 1920, from Shreveport, La.

"C. W. Durbrow, 65 Market Street, San Francisco, Calif.

"Will send with L. E. Doan expecting go California this week Large certificate to be split up and he will deliver you twenty-five hundred shares. Martin leaving for San Francisco today. Well drilling at fifteen hundred feet under favorable conditions and very promising outlook. Letter confirming.

J. E. TERRY."

Pursuant to that telegram I sent to the Trust Company and got certificates of stock. I took a certificate of stock to them that was sent to me by Terry, or delivered by Doan, I forget which. I received no other certificates of stock from anyone else. Terry told me on several occasions that

(Testimony of Herbert Fleischhacker.)

he did not wish the stock to appear in his name and he said that he had arranged to have it issued to Larry Doan.

Testimony of Herbert Fleischhacker, for Defendant.

HERBERT FLEISCHHACKER, called as a witness for the defendant, testified as follows:

I am acquainted with Dyer and Doan. Dyer has been in to see me on numerous occasions and has had money from the bank, [313] has had credit from the bank, but as to any particular conversation with him I cannot recall. As to how large a credit he has had at any one time, I tried to look up this morning, the data on his account, and I believe Dyer owed the bank \$10,000, without security, on his note. I cannot recall whether that was with reference to any particular transaction or when that credit was established. As to my telling Dyer that he could have \$50,000, and saying, "All right, you can depend upon it when you want it," I cannot recall that. I cannot recall taking Dyer over to the note teller in June or July, 1919, and telling the note teller to give Dyer anything he wanted on his note up to \$50,000. I know that Dyer has been in numerous times and stated to me that he was going into a proposition, and I have always told him to put it up to me. I never actually advanced an individual loan, I cannot do it, that is not sound banking, unless I know just what proposition the money is for. But had Dyer

(Testimony of Herbert Fleischhacker.)

come in and asked for \$15,000 or \$20,000 for a proposition, I undoubtedly would have given it to him, without security.

I have known Dyer a good many years and have given him a limited amount of credit, but as to any definite amount, I have no recollection. Our books show, I believe, that \$10,000 was given Dyer without security. I cannot recall Dyer coming to me at my office and saying that he had become interested in a \$300,000 pool of which Mr. Titus had one-half, Lucey, Doan and Dyer had the other half, and it looked awfully good, etc. I cannot recall any definite \$50,000 credit ever having been granted by me. It is possible that Dyer may have wired me asking if he could get \$10,000 or \$20,000, and that I replied to him that if he would send back his note I would cover it with a draft. I won't say that had Dyer come in and asked for \$50,000 [314] on something that I approved that I might not have granted it, but I recall no definite commitment on my part or anybody else's in the bank, or of Dyer ever having asked for \$50,000 for a definite proposition.

Cross-examination.

I make no effort to remember the transactions in my bank.

Testimony of Louis Titus, for Defendant.

LOUIS TITUS, called as a witness for the defendant, testified as follows:

I do not think that any stock of the Doan Oil Company was ever issued for less than par. I know of no sale above par. I have sold stock issued to me by the Doan Oil Company. The sales were effected by me in December, 1919, and in February, 1920. I sold about \$20,000 worth, and I sold it for \$1.00 a share. I do not think the stock has ever had a market value. I have endeavored to sell properties of the Doan Oil Company. I endeavored to sell to several people in New York, Blair & Co., William Salmon Company, White Oil Company, Sanderson & Porter, and General Petroleum Company. Efforts were made to sell the property toward the end of 1919 in New York and the spring of 1920 in San Francisco to the General Petroleum Corporation.

I saw Mr. Porter and asked if he would be interested in buying these properties, and he said that they were interested in buying oil properties, but only where they could get them at tremendous bargains; he further said that they were buying no properties, or attempting to buy no properties except where the owners were so hard-pressed financially that they were down and out, and would have to accept a fraction of what they were [315] worth. He said there were many oil companies in that condition, and that the only properties they were interested in buying were properties of that character, where the companies were in such des-

(Testimony of Louis Titus.)

perate financial straits that they must sell at any price, and if we were in that condition he would negotiate with us, otherwise he would not. That was the end of the conversation, because we told him we were not in such a condition.

We never had a firm, binding offer for the properties owned by the Doan Oil Company outside of the General Petroleum option. That option was negotiated on our side by myself. We received \$50,000 in cash and 1,000 shares of common stock of the General Petroleum Corporation. I kept the same proportion of the money and stock which I and the people whom I had sold stock to held in the Doan Oil Company. The balance Doan took. The proportion that I retained I turned over to the people I had sold stock to, their *pro rata* in it, and kept my *pro rata*.

Cross-examination.

Doan, Porter and myself were present at the conversation with Porter of the American Oil Engineering Company. We made Porter no definite proposition because he said he was not interested except under the conditions which I have already related. We made no proposition to him at all. We did not offer to sell the minority interest in the Doan Oil Company to Porter. I sold some of the stock of the Doan Oil Company to Skinner and some to Eddy. They were partners of mine, not exactly partners of mine, but I am associated with them in business and have been for many years.

(Testimony of Louis Titus.)

They are personal friends of mine and closely associated with me. As to the other people to whom I sold stock, some of them are relatives, or connected by marriage, and two or [316] three of them were merely personal friends of mine whom I had no business association with. It all went to personal friends, or associates, or relatives. As to the policy of Doan and myself with reference to the sale of property in 1919, Doan was very anxious to sell property and urged continually that we make a sale, and I was not averse to that, inasmuch as he was manager of the property and I was willing to accept his judgment on that, and it was for that reason that we made these various efforts to sell the property. I probably objected to Doan that if we sold the property we would have to consider the income tax taking the major portion of the amount received. I have no recollection of any particular conversation, but I know the effect of the income tax was always in our minds and we had some conversation about it. In making any sale of property we must give certain consideration to what portion we would have to pay in income tax, but I do not recall ever having said that I thought the major portion of the price would go in taxes. I doubt very much if that is true. There was another thing we talked about, whether it would be better, in view of the income tax, to have the corporation sell the physical property, or have us, as stockholders sell the stock. Mr. Doan thought it would be better to sell the stock, because we would only have one tax to pay.

Testimony of L. E. Doan, for Defendant (Recalled).

L. E. DOAN, recalled as a witness for defendant, testified as follows:

I remember a conversation with Porter of the American Oil Engineering Company in New York. That was Seaton Porter. Titus accompanied me. Dyer had stated to me that Sanderson and Porter, who were the managers, or principal stockholders in the American [317] Oil Engineering Company had authorized him to offer \$750,000 or \$800,000 for the property, so Titus and I were in New York, and I said, "Let us go down and see Mr. Porter, of Sanderson & Porter." So we went down, and on introducing myself to Mr. Porter, I referred to the fact that Mr. Dyer had approached me on the proposition of selling the property. He said that they were not in the market to purchase oil properties at that time, and in a joshing sort of way he said that unless we were bankrupt, or hard up, and he could get the property for much less than what it was worth, they would not be interested at all. He said that they were in the business of financing companies that were in financial distress.

I met Dyer in San Francisco at the Palace Hotel in November, 1919. I think he went up to my room. He insisted on settling the difficulty that we had in regard to the Doan Oil Company; he wanted to get the matter settled. Well, I said, "Dyer, I am out here for one purpose, only, my mother is very sick, and I am going to Stockton this afternoon on the train, and I won't take up any business

(Testimony of L. E. Doan.)

matter with you or anybody else until this matter is all settled, until my mother either gets better or worse." So I went to Stockton and remained there until my mother died. I had no conversation with him about any business matter at that time, and I refused to talk to him. I did not tell Dyer at that time that the Doan Oil Company stock was worth from five to ten dollars a share. I did not tell Dyer at any time that I would not sell the property of the Doan Oil Company for one and a quarter millions, or that we had been offered one and a quarter millions for the eighty-acre and forty-acre tracts. I never, under any circumstances, told Dyer, or requested him to make a note in his memorandum of account of the \$2667 returned to me on the [318] Considine-Martin deal. I never at any time told him that I was entitled to 20,000 shares of the Considine-Martin oil stock. I never discussed with Dyer the possibility of selling the interim certificates that were issued by the Considine-Martin Oil Company and I never stated to Dyer at any time that Terry was to get 10,000 shares of that stock and that Dyer and myself were to have 20,000.

Cross-examination.

I saw Porter at the office of Sanderson & Porter. I cannot recall if that was the latter part of 1919, or early in 1920. I did not offer to Porter at that time a minority interest in the Doan Oil Company, nor did I say to him that I wanted to retain a majority interest in the Doan Oil Com-

pany, but wanted to dispose of some holdings of that company. We made no proposition to Mr. Porter. Dyer stated that they authorized him to make a cash offer of \$800,000 for the property, and we went there to find out about it. They did not hold up to Dyer's representations.

Thereupon the testimony in evidence in the above-entitled cause closed.

The foregoing was and is all of the testimony, evidence and exhibits offered and received by said Court upon the hearing of the above-entitled action and all of the testimony, evidence and exhibits offered and received by the said Special Master upon the hearing and accounting before said Special Master, and constitutes and was the whole and entire showing of fact made in the above-entitled cause, and no other, further, different, and/or additional testimony, evidence, and/or exhibit *or* [319] *ex* or showing of fact or facts whatever, was offered and received by said Court, or by said Special Master upon said hearing; the foregoing statement of evidence is a full and complete statement of all testimony, evidence, exhibits and showing of fact or facts received by or made to said Court and said Special Master upon the hearing and trial of said action and the accounting before said Special Master; and no testimony, evidence, exhibit or exhibits and/or showing of fact or facts of any character or description, whether oral or written, was offered or received by said Court upon said hearing, or by said Special Master

on the hearing and accounting before said Special Master other than or in addition to the contents of the foregoing "Statement of Evidence."

Be it further remembered that on the 18th day of January, 1921, said Court made and gave an interlocutory decree in said cause and on the 19th day of September, 1921, the Special Master signed and filed his final report herein, and on the 21st day of December, 1921, said Court made and gave its final decree in said cause, both of which said decrees and the said final report are set forth at large in the transcript of record in the above-entitled action and to which decrees and report express reference is hereby made for the purpose of greater certainty, and to both of which said decrees said defendant and appellant then and there duly objected as set forth in their written objections to said decrees filed in said cause and court, and part of the transcript of record herein, to which said objections, for greater certainty, reference is hereby expressly made.

And now comes said defendant and appellant and makes, presents, offers and files the foregoing "Statement of Evidence" as his statement of evidence for use upon the appeal heretofore taken by him from said interlocutory and final decrees.
[320]

WHEREFORE, said defendant and appellant prays that this statement of evidence be settled, allowed and approved by said Court and be ordered

made part of the record in the above-entitled action.

Dated, San Francisco, California, March 26, 1922.

C. W. DURBROW,

JOHN BREUNER, Jr.

Solicitors for Defendant. [321]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Stipulation as to Statement of Evidence.

IT IS HEREBY STIPULATED AND AGREED that the foregoing statement of evidence is true and correct in all particulars, and that the same may be settled, allowed and approved by said Court without further notice, and that the same may be made a part of the record in the above-entitled cause.

Dated, San Francisco, August 15th, 1922.

W. H. METSON,

R. G. HUDSON,

Solicitors for Complainant.

C. W. DURBROW,

JOHN BREUNER, Jr.,

Solicitors for Defendant. [322]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

**Order Settling, Allowing and Approving Statement
of Evidence in the Above-entitled Cause.**

In the matter of the foregoing statement of evidence, duly presented in time by the above-named defendant, appellant herein,—

IT IS HEREBY ORDERED BY SAID COURT that said statement of evidence be and the same is hereby settled, allowed and approved as true and correct in all particulars, and

IT IS HEREBY ORDERED BY SAID COURT that said statement of evidence be and the same is hereby made a part of the record of the above-entitled cause.

Given, made and dated at San Francisco, California, this 15th day of August, 1922.

FRANK H. RUDKIN,
District Judge.

[Endorsed]: Filed Aug. 15, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [323]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 543—IN EQUITY.

B. T. DYER,

Plaintiff,

vs.

L. E. DOAN,

Defendant.

Assignment of Errors.

COMES NOW the defendant, L. E. Doan, by his solicitors, C. W. Durbrow and John Breuner, Jr., and says that the interlocutory decree made and entered in the above-entitled cause on the 18th day of January, 1921, and the final decree made and entered in the above-entitled cause on the 21st day of December, 1921, are erroneous, unjust and prejudicial to the defendant and the defendant files the following Assignment of Errors upon which he will rely upon his prosecution of the appeal from said decrees in the above-entitled action:

EXCEPTION I.

That the Court erred in finding and decreeing that in the latter part of August, 1918, in the State of California, plaintiff and defendant morally associated themselves together and entered into and formed a copartnership for the general purpose of carrying on business together in operating oil bearing lands and interests therein, and in mineral

oils in the United States, and under which they were to acquire oil bearing lands and leases [324] on oil bearing lands and to deal generally in operating and selling oil bearing lands and acquiring interests in co-operative dealing or to deal in the same, and interests in the assets of said corporations, either as copartners or by the formation of corporations to be controlled by plaintiff and defendant, or in which plaintiff and defendant, or either of them, might or should become interested.

EXCEPTION II.

That the Court erred in finding and decreeing that plaintiff and defendant thereupon and thereafter entered upon such copartnership business and did until on or about the 22d day of March, 1920, continue to transact and carry on the said business.

EXCEPTION III.

That the Court erred in not finding and decreeing that the copartnership business between plaintiff and defendant, if any did exist, was dissolved by mutual consent at the time of the formation of the North Texas Supply Company at Fort Worth, Texas, in May, 1919.

EXCEPTION IV.

That the Court erred in finding and decreeing that plaintiff and defendant at any time, either orally or otherwise, associated themselves together and entered into and formed a copartnership for any purpose whatsoever.

EXCEPTION V.

That the Court erred in finding and decreeing that plaintiff and defendant entered upon and transacted and carried on any copartnership business whatsoever.

EXCEPTION VI.

That the Court erred in not finding and decreeing that [325] at the time of the formation of the North Texas Supply Company in the month of May, 1919, plaintiff and defendant terminated and dissolved any and all copartnership business they may have entered upon or transacted or carried on previous to such time.

EXCEPTION VII.

That the Court erred in finding and decreeing that plaintiff and defendant agreed to and did give their attention to and did devote their time to the business of said or any copartnership.

EXCEPTION VIII.

That the Court erred in finding and decreeing that each of said parties did from time to time furnish and supply moneys for the purpose of promoting and carrying on the business of said or any copartnership.

EXCEPTION IX.

That the Court erred in finding and decreeing that the said plaintiff and defendant were to divide

the profits of said business between said plaintiff and defendant equally.

EXCEPTION X.

That the Court erred in finding and decreeing that on or about the 22d day of March, 1920, the said defendant did repudiate said or any partnership.

EXCEPTION XI.

That the Court erred in finding and decreeing that prior to the said date, to wit: the 22d day of March, 1920, the said plaintiff and defendant did acquire certain lands and oil leases in the State of Louisiana.

EXCEPTION XII.

That the Court erred in finding and decreeing that prior [326] to the said date, to wit, the 22d day of March, 1920, the said plaintiff and defendant did acquire shares of stock in the Doan Oil Company and the Martin-Considine Syndicate.

EXCEPTION XIII.

That the Court erred in declaring, ordering and decreeing that the partnership mentioned in the amended complaint and bill was dissolved as and from the 22d day of March, 1920, or as and from any other date.

EXCEPTION XIV.

That the Court erred in not ordering, adjudging and decreeing that the partnership mentioned in the amended complaint and bill, if found to exist

at all, was dissolved as and from the date of the formation of the North Texas *Supply*, to wit, during the month of May, 1919.

EXCEPTION XV.

That the Court erred in declaring, finding and decreeing that the said properties and interests in lands, leases and stocks mentioned in the interlocutory decree entered January 18, 1921, to wit: certain lands and oil leases upon oil lands in the State of Texas and in the State of Oklahoma and in the State of Louisiana and shares of stock in certain corporations, to wit, in the Doan Oil Company and the Martin-Considine Syndicate are in equity assets of the said or any partnership.

EXCEPTION XVI.

That the Court erred in ordering and decreeing that this proceeding be referred to H. M. Wright, Esq., as the Special Master to take and make an account and inquiry as specified in said interlocutory decree entered January 18th, 1921.

EXCEPTION XVII.

That the Court erred in ordering and decreeing that this [327] proceeding be referred to a Special Master to take any accounting whatsoever.

EXCEPTION XVIII.

That the Court erred in not ordering and decreeing that any accounting if taken before a Special Master be confined to a date not later than

the formation of the North Texas Supply Company in the month of May, 1919.

EXCEPTION XIX.

That the Court erred in ordering and decreeing that this proceeding be referred to a Special Master to take and make an account of partnership dealings between the said plaintiff and defendant since the — day of August, 1918, and including an account of dealings of their partnership assets and the acquisition thereof and the disposition thereof and the advances made by each and the receipts obtained by each and the property obtained by each since that time down to March 22d, 1920, and from March 22d, 1920, all the avails and profits received from property on hand, or since received from the sale, trading in or other disposition thereof.

EXCEPTION XX.

That the Court erred in ordering and decreeing that this proceeding be referred to a Special Master to make an inquiry of what the partnership assets, property and effects consist and in what manner and upon what terms and conditions the same might be sold most beneficially to all parties interested therein.

EXCEPTION XXI.

That the Court erred in ordering and decreeing that this proceeding be referred to a Special Master to take an account of any partnership dealings between plaintiff and defendant and to make an in-

quiry as to what the property, assets or effects consist [328] of.

EXCEPTION XXII.

That the Court erred in ordering and decreeing that said partnership estate, property and effects or any property and effects whatsoever be divided or sold with the approbation of the Court.

EXCEPTION XXIII.

That the Court erred in making and entering said interlocutory decree entered January 18th, 1921, and in decreeing in favor of the complainant against the defendant.

EXCEPTION XXIV.

That the Court erred in not making and entering a decree herein in favor of defendant and against complainant for defendant's costs in this suit.

EXCEPTION XXV.

That the Court erred in finding and decreeing in the final decree entered on December 21st, 1921, that 100,000 shares of the stock of the Doan Oil Company were prior to and on November 10th, 1919, or at any other time, the property of plaintiff and defendant.

EXCEPTION XXVI.

That the Court erred in finding and decreeing that the right to purchase 33,333 shares of stock of the Doan Oil Company as being part of the second issue of stock of the said Company issued

on or about the 10th day of November, 1919, was a valuable asset, or any asset whatsoever, to the said or any copartnership.

EXCEPTION XXVII.

That the Court erred in adjudging and decreeing that the defendant, L. E. Doan, account to the plaintiff, B. T. Dyer, for the said 33,333 shares of stock of the Doan Oil Company. [329]

EXCEPTION XXVIII.

That the Court erred in ordering, adjudging and decreeing that this 33,333 shares of stock of the Doan Oil Company be disposed of and divided in the same manner and subject to the same terms and conditions as the original issue to the defendant, Doan, of 100,000 shares of stock of the Doan Oil Company.

EXCEPTION XXIX.

That the Court erred in ordering, adjudging and decreeing that this 33,333 shares of stock of the Doan Oil Company be disposed of and divided between the said plaintiff and the said defendant.

EXCEPTION XXX.

That the Court erred in ordering, adjudging and decreeing that plaintiff was since March 22, 1920, or at any other time, the owner of one-half of 133,333 shares of the capital stock of the Doan Oil Company, to wit: 66,666½ shares.

EXCEPTION XXXI.

That the Court erred in ordering, adjudging and decreeing that in respect to the said 33,333 shares of stock of the Doan Oil Company the exception of the plaintiff to the report of the Special Master is sustained.

EXCEPTION XXXII.

That the Court erred in ordering, adjudging and decreeing that in all other respects the report of the Special Master be confirmed.

EXCEPTION XXXIII.

That the Court erred in sustaining plaintiff's exception No. 1 to the Special Master's report on accounting filed in this cause and which exception is as follows: [330]

“The plaintiff excepts to the said report, and to the findings of fact made by the Special Master, with reference to the second issue of the 33,333 shares of the capital stock of the Doan Oil Company.”

That the portion of the Special Master's report to which the foregoing exception was directed and which contained the findings of fact excepted to by plaintiff is as follows:

SECOND ISSUE OF 33,333 SHARES DOAN OIL COMPANY.

At a directors' meeting of the Doan Oil Company held on November 10, 1919, the corporation offered for sale 100,000 shares of its capital stock

at \$1.00 per share, payable one-half on or before December 15, 1919 and one-half on or before January, 1920, and that said stock be offered to the stockholders as follows:

50,000 to Titus.

33,333 shares to Doan, and

16,667 shares to Lucey,

and that if any of such stockholders failed to subscribe and pay for all or any portion of their allowance, the stock should be subjected to such further action as the Board might decide. It may be said now that the terms of payment as prescribed were apparently not strictly enforced. It is claimed by plaintiff that the Master should determine the value of the stock of the Doan Oil Company in connection with this second issue and in other connections but it does not seem to me material. It is sufficient to say that the evidence shows that the stock was valuable, worth at least the issue price, and in my opinion considerably more. In fact, on March 26, 1920, a dividend of fifty cents per share was declared on the entire capital stock including this second issue of 100,000 shares as well as the first issue of 300,000 shares.

This right given to Doan to subscribe to 33,333 shares by the Company was valuable and was a partnership asset. Good faith to his partner required that Doan should exercise it for the partnership benefit if he could and should also disclose the right to subscribe to Dyer. He did neither. [331]

As to his failure to disclose this subscription right to Dyer, it may be said that this action is, of course, peculiar in that during all this time he was writing voluminously to Dyer about his operations and the success of the Doan Oil Company. However, I draw no special inferences of bad faith for the few months succeeding the passage of the resolution or until about March, 1920, when relations between the partners began to be strained. In any event, it is not evident from the evidence that Dyer would or could have subscribed to this extra stock and so he is not proved to have been harmed by Doan's non-disclosure. He apparently had no considerable funds of his own and his credit is limited by the proof to \$50,000.00. It is therefore not apparent that Dyer could have taken the extra 16,666 shares any easier than Doan could have done so.

As to Doan's failure to exercise his right, Doan has testified that at that time he did not have the funds and this has not been proved untrue. His statement is corroborated by the fact that he did not himself pay for any of this stock until March 23, 1920. There is, of course, evidence the other way in the above quoted letter of January 23, 1920, where Doan said that he would take over Dyer's obligation to pay \$50,000.00 to the partnership on the terms mentioned by Dyer. This, however, can be readily explained by Doan's expectation that he could get a loan of the necessary amount and keep all or a portion of the 12,500 shares for himself. In any event, it must be remembered that

the terms of the partnership implied a discretion in Doan as to how much of his money he should invest. He certainly could not be compelled to borrow nor even to invest funds of his own on hand if he did not deem it wise. Non-investment, therefore, in the second issue of stock, as a fact *per se*, is no evidence of bad faith to the firm and Dyer cannot complain.

The actual disposition of the shares do not change this conclusion. The right to take up 3,333 shares went to S. S. Raymond, geologist of the Company. Doan explains that Raymond desired 10,000 and it was agreed between Titus, Lucey and himself that they would satisfy Raymond's desire by *pro rata* contributions from their respective allotments. Five thousand (5000) shares of this issue went to Claude Gatch and one, Morris. Messrs. Gatch and Morris, business men of high standing in Oakland, California, had in April, 1919, at Doan's suggestion, sent him equal parts of \$5000.00 for investment in oil properties. It was this money which Doan had in hand since the beginning of his operations in Louisiana, part of the capital with which he operated and was, therefore a debt of the partnership in the same [332] sense as was money supplied by Messrs. Titus and Lucey to Doan. As a matter of fact, it should have been satisfied out of the first issue. Its satisfaction out of the second issue was the fulfillment of a partnership liability and cannot be questioned by Dyer.

Fifteen thousand (15,000) shares went to Doan's

relatives, namely, 5,000 to his nephew R. E. Doan; 2500 shares to his sister Hattie E. Doan; 2500 shares to his sister Mary Elizabeth Doan; 4800 shares to his brother, C. E. Doan; and 200 shares to the latter's daughter, Mrs. Elbert C. Parks. The bare fact that this stock went to Doan's relatives raises a presumption of a collusive arrangement for Doan's benefit at Dyer's expense and plaintiff so charges, but the evidence is very plain that each of these persons paid for the stock with his or her own money and that there was and is no agreement for resale to Doan. The money was sent to Doan in the latter part of December, 1919 on his suggestion that the investment was a wise one. If, as he states and as we must assume, he had no money of his own for further investment it was natural and proper that he should invite those near to him to take over his rights to the stock. The fact that their remittances passed through Doan's account or even rested temporarily with him does not change this conclusion.

There remains a balance of 10,000 shares, which the stock-book shows was issued on March 22, 1920 to L. E. Doan and reissued April 2, 1920 to L. E. Doan, Jr. Payment was made by defendant Doan's check on March 23, 1920, in the sum of \$14,498.57 and by the application of a credit to Doan on the books of the Company arising from prior transactions, of \$501.43. This \$15,000.00 covered the 10,000 shares in question and the 5000 issued to Gatch and Morris. Of this amount \$10,000.00 was, of course, Doan's own funds. There is

considerable testimony aiming to prove that Doan had promised his son an interest in the Doan Oil Company in the summer of 1919, partly out of the natural affection and interest and as a regard for meritorious conduct in the National service during the war. This evidence seems to me immaterial. Doan's first duty at this time was to his partner. If Doan had invested this money and caused the issuance of 10,000 shares to his son at the time he promised it to him in the summer of 1919, my conclusion would be that lacking Dyer's consent, such an investment of his money would have been unauthorized and would have to come out of Doan's share of the assets. But it must be remembered that Doan had the right, as Dyer had, to dissolve the partnership at any time. He did so by repudiating it on the morning of March 22, 1920 and his investment the next day was after the termination of the partnership. The point is [333] possibly debatable, but my mature conclusion is that this purchase of shares by Doan was not a partnership transaction. I conclude that the amount of shares here under discussion, 33,333 shares, did not and do not constitute an asset of the partnership.

EXCEPTION XXXIV.

That the Court erred in sustaining plaintiff's exception No. 2 to the Special Master's report on accounting filed in this cause and which exception is as follows:

“The plaintiff excepts to the said report, and to the findings of fact made by the Special Master, wherein it is determined and found that the plaintiff is not entitled to an accounting from the defendant with reference to the second issue of the 33,333 shares of the capital stock of the Doan Oil Company.”

That the portion of the Special Master's report to which the foregoing exception was directed and which contained the findings of fact excepted to by plaintiff is set forth and quoted in the foregoing exception, to wit: Exception XXXIII.

EXCEPTION XXXV.

That the Court erred in overruling the defendant's exceptions to the Special Master's report on accounting.

EXCEPTION XXXVI.

That the Court erred in overruling defendant's exception to the report of the Special Master on accounting and being exception No. 1 and which is as follows:

“Exception is made to the report in so far as it holds that 7,000 shares of the stock of Doan Oil Company, in addition to the 93,000 shares originally paid for by defendant, are partnership assets, and that plaintiff is entitled to one-half thereof on accounting to defendant for \$3,500 with interest; or that plaintiff is entitled to any dividends which have accrued thereon and been received by defendant.”

for the reason that the evidence showed that the defendant, L. E. Doan, received the said 7,000 shares of stock in lieu of salary [334] from the Doan Oil Company and that the testimony of the plaintiff, B. T. Dyer, sets forth that it was understood between him and the defendant, Doan, that each should retain their salaries, to wit: Doan, his from the Doan Oil Company, and Dyer, his from the North Texas Supply Company and from the American Oil and Engineering Company.

EXCEPTION XXXVII.

That the Court erred in overruling defendant's exception to the report of the Special Master on accounting and being exception No. 2 and which is as follows:

“Exception is made to the report in the particular that it does not require plaintiff to account to defendant for one-half of the stock of the North Texas Supply Company, which the evidence shows plaintiff agreed to subscribe and pay for on behalf of the ‘partnership,’ and one-half of the salary which plaintiff received from the North Texas Supply Company and from the American Oil Engineering Company.”

EXCEPTION XXXVIII.

That the Court erred in overruling the defendant's exception to the Special Master's report on accounting and being exception No. 4 and which is as follows:

“Exception is made to the report in so far as it undertakes to interpret the decree entered by the Court herein as holding that the shares of the General Petroleum Company, or any moneys derived from this transaction by defendant, are a part of the partnership assets; or that plaintiff is entitled to any dividends which have accrued thereon and been received by defendant, and in holding that plaintiff is entitled to one-half of the moneys received by defendant in this transaction and one-half of the proceeds of the sale of two shares of the stock of the General Petroleum Company to Louis Titus, and that plaintiff is entitled to one-half of the 248 shares of stock of this company or any other interest therein.”

inasmuch as the evidence shows that the defendant, Doan, acquired the stock of the General Petroleum Company and received dividends on said stock as a result of an option given by the defendant, [335] Doan, upon his stock of the Doan Oil Company and is independent of and foreign as to any transaction whatever between the plaintiff, Dyer, and the defendant, Doan.

EXCEPTION XXXIX.

That the Court erred in overruling the defendant's exception to the Special Master's report on accounting and being exception No. 5, which is as follows:

“Exception is made to the report in the particular that it does not allow defendant

interest upon all moneys advanced by him from the date said moneys were advanced, as shown by defendant's account heretofore filed with the Master, to date."

inasmuch as the evidence shows that the defendant advanced all moneys whatsoever for the acquisition of the stock of the Doan Oil Company and that plaintiff, Dyer, has not, at any time, contributed any amount whatsoever toward the purchase price of said stock.

EXCEPTION XL.

That the Court erred in ordering, adjudging and decreeing that the plaintiff is entitled to one-sixth of the sum of \$50,000, and also 1,000 shares of the capital stock of the General Petroleum Corporation, to wit: the sum of \$8,333.33 cash, and also $166\frac{2}{3}$ shares of the General Petroleum Corporation.

EXCEPTION XLI.

That the Court erred in ordering, adjudging and decreeing that plaintiff is entitled to $165\frac{1}{2}$ shares of the General Petroleum Corporation or any other stock whatsoever of said corporation.

EXCEPTION XLII.

That the Court erred in ordering, adjudging and decreeing that plaintiff is entitled to credit for all dividends or any [336] dividends received by defendant since April 16, 1920, on stock of the General Petroleum Corporation, to wit: $165\frac{1}{2}$ shares or any other number of shares and that plaintiff

is entitled to credit for his proportion or any proportion whatsoever of future dividends that may be paid by said General Petroleum Corporation.

EXCEPTION XLIII.

That the Court erred in ordering, adjudging and decreeing that 15,000 shares of Considine-Martin Oil Company are or were at any time a partnership asset.

EXCEPTION XLIV.

That the Court erred in ordering, adjudging and decreeing that the plaintiff is entitled to 7,500 shares of stock of the Considine-Martin Oil Company, or any part thereof, and to all dividends declared thereon and paid to defendant.

EXCEPTION XLV.

That the Court erred in ordering, adjudging and decreeing that a receiver be appointed to take charge of the property and assets of the copartnership found by the Court on or before the 5th day of January, 1921, unless the defendant deposit with the Clerk of the Court one-half of 133,333 shares of the capital stock of the Doan Oil Company and one-half of the capital stock of that certain corporation commonly known and designated as the Considine-Martin Oil Company, to wit: 7,500 shares, and also 165½ shares of the capital stock of that corporation commonly known and designated as the General Petroleum Corporation.

EXCEPTION XLVI.

That the Court erred in ordering, adjudging and decreeing that the defendant deposit any shares of stock whatsoever with the Clerk of said Court under any terms and conditions whatsoever. [337]

EXCEPTION XLVII.

That the Court erred in ordering, adjudging and decreeing that each of said 66,666½ shares of Doan Oil Company stock, and each and every of said shares of Considine-Martin Oil Company stock, to wit: 7,500 shares, and each and every of said shares of the General Petroleum Corporation stock (165½ shares) should be issued in the name of B. T. Dyer or properly endorsed so that the same could be assigned to and transferred to him.

EXCEPTION XLVIII.

That the Court erred in ordering, adjudging and decreeing that should the defendant appeal, that plaintiff should not be required to pay the defendant any interest on the sum of \$12,645.90, less costs, for the period of time commencing with the filing of notice of such appeal and ending with the filing of the mandate on appeal with the Clerk of said Court and which said sum is the amount required to be paid by the plaintiff, Dyer, to the defendant, Doan, under the findings of said Court and the decrees entered therein.

EXCEPTION XLIX.

That the Court erred in ordering, adjudging and decreeing that the plaintiff recover his costs.

EXCEPTION L.

That the Court erred in granting the plaintiff's motion to retax his costs of suit and allowing plaintiff as costs, the sum of \$1,500.00 paid by plaintiff to the Special Master and being one-half of the Special Master's fee for his services upon the accounting, the other one-half of said fee having been paid by defendant and not having been considered in any accounting between the parties. [338]

EXCEPTION LI.

That the Court erred in making and entering said final decree entered December 21st, 1921, or in decreeing in favor of the complainant and against this defendant.

WHEREFORE, defendant prays that said interlocutory decree dated January 18th, 1921, and said final decree dated December 21st, 1921, be reversed, and that said District Court be directed to dismiss the amended complaint and bill herein on file, and for such other and further relief as may be meet and equitable.

C. W. DURBROW,

JOHN BREUNER, Jr.,

Solicitors for Said Defendant.

[Endorsed]: Filed Jan. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [339]

(Title of Court and Cause.)

Petition for Appeal.

To the Honorable WILLIAM C. VAN FLEET, District Judge:

The above-named defendant feeling aggrieved by the interlocutory decree rendered and entered in the above-entitled cause on the 18th day of January, 1921, and by the final decree rendered and entered in the above-entitled cause on the 21st day of December, 1921, does hereby appeal from the said decrees to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decrees were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

And your petitioner further prays that the proper order relating to the security to be required of him be made.

Dated at San Francisco, California, this 16th day of January, 1922.

L. E. DOAN,

Defendant.

C. W. DURBROW,

JOHN BREUNER, Jr.,

Solicitors for Said Defendant.

[Endorsed]: Filed Jan. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [340]

(Title of Court and Cause.)

Order Allowing Appeal.

On motion of C. W. Durbrow, Esq., and John Breuner, Jr., Esq., solicitors and counsel for defendant,

IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the 9th Circuit of the United States from the interlocutory decree heretofore filed and entered herein on the 18th day of January, 1921, and the final decree heretofore filed and entered herein on the 21st day of December, 1921, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be transmitted to said United States Circuit Court of Appeals for the 9th Circuit.

IT IS FURTHER ORDERED that a bond on appeal be fixed at the sum of \$500, the same to act as a supersedeas bond for costs and damages on appeal.

Dated: January 16th, 1922.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jan. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [341]

(Title of Court and Cause.)

Bond on Appeal.

WHEREAS, the above-named L. E. Doan has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the interlocutory decree made and entered herein on the 18th day of January, 1921, and the final decree made and entered herein on the 21st day of December, 1921,

NOW, THEREFORE, in consideration of the premises, the undersigned, National Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of the defendant, L. E. Doan, that the said defendant will prosecute his said appeal to effect and answer all costs and damages if he fail to make good his plea and appeal, not exceeding the sum of \$500, to which amount it acknowledges itself justly bound.

Dated at San Francisco, California, this 13th day of January, 1922.

NATIONAL SURETY COMPANY. (Seal)

By FRANK L. GILBERT,

Resident Vice-President.

By A. C. ROBESON,

Resident Assistant Secretary. [342]

State of California,

City and County of San Francisco,—ss.

On the 13th day of January, 1922, personally appeared before me, C. B. Sessions, a Notary Public in and for the said City and County of San Francisco, State of California, duly commissioned and sworn Frank L. Gilbert, Resident Vice-President and A. C. Robeson, Resident Assistant Secretary known to me to be the said officers, respectively, of the National Surety Company, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco the day and year in this certificate first above written.

[Seal]

C. B. SESSIONS,

Notary Public in and for the City and County of
San Francisco, State of California.

The within bond is approved this 16th day of
January, 1922.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jan. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [343]

(Title of Court and Cause.)

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Said Court:

Sir:

Please prepare record on appeal and incorporate therein:

1. Complaint (Amended).
2. Answer.
3. Memorandum Opinion, filed Jan. 4, 1921.
4. Interlocutory Decree, filed Jan. 4, 1921.
5. Special Master's Report on Accounting, filed Sept. 19, 1921.
6. Defendant's Exceptions to Special Master's Report, filed October 7, 1921.
7. Plaintiff's Exceptions to Special Master's Report, filed Oct. 7, 1921.
8. Memorandum Opinion on Exceptions to Report, filed Nov. 21, 1921.
9. Order, filed Dec. 2, 1921, Granting Plaintiff's Exceptions, and Overruling Defendant's Exceptions.
10. Final Decree, filed Dec. 8, 1921.
11. Memorandum Opinion on Motion to Retax Costs.
12. Order Granting Retaxing of Costs.
13. Statement of Evidence.
14. Petition for Appeal.
15. Assignment of Errors.
16. Order Allowing Appeal.
17. Bond on Appeal.

18. Citation.

19. This Praecipe.

C. W. DURBROW,
JOHN W. BREUNER, Jr.
Attorneys for Deft.

Receipt of a copy of the within is hereby admitted this 27th day of March, 1922.

W. H. METSON,
R. G. HUDSON,
Attorneys for Pltff. [344]

[Endorsed]: Filed Mar. 28, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk [345]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred and forty-five (345) pages, numbered from 1 to 345, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on appeal in the above-entitled cause, as the same remain on file and of record in the office of the clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$157.70; that said amount was paid by the defendant; and that the original citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court, this 23d day of August, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [346]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. T. Dyer,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein L. E. Doan is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 16th day of January, A. D., 1922.

WM. C. VAN FLEET,
United States District Judge. [347]

Receipt of a copy of the within Citation on Appeal is hereby admitted this 16th day of January, 1922.

W. H. METSON,
R. G. HUDSON,
Attorneys for Plaintiff.

[Endorsed]: No. 543—In Equity. United States District Court for the Northern District of California, Southern Division. B. T. Dyer, Appellant, vs. L. E. Doan. Citation on Appeal. Filed Jan. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3915. United States Circuit Court of Appeals for the Ninth Circuit. L. E. Doan, Appellant, vs. B. T. Dyer, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division. Filed August 23, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.

L. E. DOAN,

Appellant,

vs.

B. T. DYER,

Appellee.

**Stipulation and Order Extending Time to and In-
cluding August 25, 1922, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED by and between
the parties hereto that the return day of the citation
on appeal to the United States Circuit Court of
Appeals for the Ninth Circuit and the time in which
to file the transcript of record and docket the above-
entitled cause be and the same is hereby en-
larged and extended up to and including the 25th
day of August, 1922.

Dated: August 10, 1922.

C. W. DURBROW,
JOHN BREUNER, Jr.,
Attorneys for Appellant.
W. H. METSON,
R. S. HUDSON,
Attorneys for Appellee.

It is so ordered this 10th day of August, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3915. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. L. E. Doan, Appellant, vs. B. T. Dyer, Appellee. Stipulation and Order Extending Time. Filed Aug. 10, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3915

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

L. E. DOAN,

Appellant,

VS.

B. T. DYER,

Appellee.

BRIEF FOR APPELLANT.

C. W. DURBROW,

JOHN BREUNER, JR.,

Attorneys for Appellant.

FILED

OCT 12 1922

F. D. MONCKTON,
CLERK.

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No. 3915

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. E. DOAN,

Appellee.

VS.

B. T. DYER,

Appellant,

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This suit, originally filed by appellee in the Superior Court of the State of California, in and for the City and County of San Francisco, and later removed to the Southern Division of the United States District Court for the Northern District of California, Second Division, by appellant, defendant below, upon the ground of the diversity of citizenship relates to an alleged partnership between the parties.

It is alleged in the complaint that during the month of August, 1918, the parties entered into an oral agreement of partnership for the general purpose of acquiring and selling oil lands and leases of

oil lands and interests in such properties; that under the terms of said agreement the parties, and each of them, should and would give their attendance and devote their entire time and attention to the business thereof, and to the furtherance and advancement of the partnership business and affairs to their mutual benefit and advantage; that said plaintiff and said defendant should from time to time furnish to such copartnership

“such sums of money as should be necessary to promote and carry on its business and purposes, and that they should divide the profits if any thereof between them, share and share alike”;

that the parties should keep accounts and account to one another for all moneys received and paid out. It is further alleged in the complaint that as the result of said partnership the parties acquired and disposed of certain oil lands and leases and interests in corporations of the approximate value of \$250,000.00; that the partnership had never been dissolved; that while plaintiff had at all times fully complied with all terms and conditions of the partnership agreement defendant had wrongfully applied certain moneys and properties of the partnership to his own use and had impeded and injured the business of the partnership and had devoted his time and attention to his personal business and affairs to the detriment of said partnership business; that the defendant had failed, neglected and refused to pay and deliver, assign and transfer the moneys, properties and interests to the partnership and plaintiff.

The prayer of the complaint is that the partnership be dissolved and defendant be required to account to plaintiff (Complaint, Tr. 1-8).

The answer denies that the parties at any time entered into or formed a partnership for the purposes specified in the complaint or for any other purpose at all, or that the parties at any time entered into an agreement of partnership, either oral or in writing, and in other respects generally traverses the complaint.

The trial Court held that the parties'

“venture was a joint one at least * * *”
and was “inclined to the opinion that it constituted a partnership as defined by the Civil Code of California”,

holding further that the

“relationship between the parties was dissolved March 22nd, 1920” (Tr. 14-16).

An interlocutory decree was entered in conformity with the Court's opinion, in which it was decreed that the parties “orally associated themselves together, entered into and formed a co-partnership” the latter part of August, 1918, which was dissolved on the 22nd day of March, 1920, and ordered that the proceedings be referred to Hon. H. M. Wright, as Special Master, to take and make an account (Tr. 16-20).

Thereafter evidence was introduced before the Special Master and an original and supplemental report entered on the accounting (Tr. 20-57, 57-61).

Thereupon each of the parties took exceptions to the Master's report (Tr. 61, 64). The exceptions were submitted to and argued before the trial Court and memorandum opinion was rendered and order for decree on the exceptions to the report of the Special Master was entered on the 2nd day of December, 1921 (Tr. 66-71).

An order was thereupon entered granting plaintiff's exceptions and overruling defendant's exceptions (Tr. 71). Final decree was entered defining the respective interests of the parties (Tr. 72-79).

This appeal relates both to the interlocutory and final decrees.

ERRORS UPON WHICH APPELLANT RELIES.

Briefly stated appellant's appeal is predicated upon the finding made in the interlocutory decree that a partnership at any time existed between the parties, and that if any such partnership did exist the Court erred in failing to find that such a partnership was dissolved the latter part of May, 1919;

That the Court erred in rendering the final decree in sustaining plaintiff's exceptions to the Master's report with regard to the second issue of 33,333 shares of the stock of Doan Oil Company;

The Court erred in rendering a final decree overruling defendant's exceptions to the Master's report, denying defendant interest on money which he had advanced as specified in the report.

SCOPE OF REVIEW.

It is our conception of the law that upon appeal in a case such as this the Appellate Court will review the record for the purpose of ascertaining whether the evidence sustains the interlocutory and final decrees, and also whether under the facts the conclusions of law are correct, and will examine the entire case upon its merits and direct final decree accordingly.

Waterloo Mining Co. v. Doe, 82 Fed. 45, 51;
Carson v. Combe, 86 Fed. 202, 210;
Dower v. Richards, 151 U. S. 658, 663;
Ward Baking Co. v. Webber Bros. 230 Fed.
142.

THERE ARE TWO MAIN QUESTIONS FOR DETERMINATION.

The case is naturally divided into two main questions:

Whether under the facts and the law the relation of the parties was that of partners;

Whether, in the event the parties are held to be partners, the final decree determining the respective rights and interests of the parties is correct.

The determination of the issues involves both questions of fact and law.

It is elementary that in the absence of a written agreement of partnership the party who alleges its existence must assume the burden of establishing the fact that a partnership existed by clear and convincing proof.

The issues are simple and would be easy of determination were it not for the fact that there is great conflict in the testimony given by the respective parties and it therefore becomes necessary in order to determine the precise facts to review the evidence at length and analyze this testimony in the light of the other evidence before the Court. An analysis of the evidence will also serve to develop the fact that during the month of May, 1919, there was a marked change in any relationship that may have theretofore existed between the parties. Prior to that time they had engaged in several independent ventures in Texas and Oklahoma but in May, 1919, Dyer (*) assumed the presidency of the North Texas Supply Company at Wichita Falls, Texas, and later in the year entered into the employ of the American Oil Engineering Company, during all of which time Doan, independently of Dyer, devoted his entire time and attention to developing properties which Messrs. Titus, Lucey and himself had acquired in Louisiana, in which Doan invested \$100,000 of his own funds.

THERE WAS NO AGREEMENT OF PARTNERSHIP.

Relationship of the parties from August, 1918, to May 30th, 1919.

Dyer testified that after having made a preliminary trip through the Texas oil fields in the latter part of August, 1918, he described to Doan in San

* For the sake of clarity and brevity we shall refer to the parties by their last names without, of course, intending any disrespect.

Francisco, in August, 1918, what he had seen in *Texas*, and stated

“that the opportunities are so big that I am going back, and we ought to go back and get in the game, I am going back anyway”.

According to the testimony of Dyer, Doan then told Dyer that he would go back with him as soon as certain legal matters had been cleared up and:

“We will go back there and hit the ball, and
* * * we will divide our profits. * * *
You go ahead” (Tr. 109-110).

On cross-examination Dyer testified:

“On my direct examination I gave the sum and substance of all conversations relating to a partnership arrangement, and I don’t recall any other conversations or any other arrangements I have ever had with Doan with reference to any partnership. What I said upon direct examination is *all the arrangements that I ever had or ever made* with Doan at *any time* with reference to a partnership between us. I did not have any other arrangement or understanding with Doan except as I have testified.
* * * The sum of all that was said by Doan at that time, in response to my suggestion that we go to *Texas*, was that I stated to Doan after I advised him what investigations I had made, ‘I am going back anyway, Larry, and I want you to come back with me’, and Doan’s reply was, ‘I will come back with you and follow you up and hit the ball and back you up, and we will divide the profits’. That was the sum of our many conversations” (Tr. 120). (*Italics ours except where otherwise noted.*)

Doan denied having made these statements and testified that he had no agreement whatever with

Dyer before he went to Texas and there was no understanding except that he was to go back to Texas (Tr. 179).

Leaving out of consideration for the purposes of argument the denial of this "partnership agreement" by Doan, and without stressing the point that the burden of proving a partnership by clear and convincing evidence rests upon Dyer, and reading Dyer's testimony as it stands in the record, in which he stated that his testimony upon direct examination

"is all the arrangements that I ever had or ever made with Doan at *any time* with reference to a partnership between us",

it is impossible to escape the conclusion that any agreement or understanding related exclusively to operations in *Texas*, that Doan agreed to do no more than back Dyer up and divide such profits as might be yielded to Doan by operating in oil lands in that state, and there was no agreement of partnership.

THE "AGREEMENT" INTERPRETED IN THE LIGHT OF THE PARTIES' CONDUCT.

The subsequent conduct of the parties supports this contention and will, we believe, compel the ultimate conclusion that the parties never entered into an agreement of partnership, but that they subsequently, as was suggested by the trial Court, engaged in several independent joint ventures within the period presently under consideration, and that

these relations did not continue after the date Dyer became president of the North Texas Supply Company.

Dyer testified on cross-examination that no land purchased was ever carried in the name of Doan & Dyer or Dyer & Doan; they never had any account in the name of Doan & Dyer or Dyer & Doan; they never had any joint bank or other account nor common fund; never had any common books of account; that none of the profits which accrued from any transaction in which Dyer received a commission were ever placed in any joint account; never had any stationery upon which both the names Dyer & Doan appeared; but that when Dyer represented Doan it was by virtue of a power of attorney which Doan had given Dyer, and that when some of the leases were sold in the name of Doan "I was acting as his attorney in fact" (Tr. 121, 122-124).

According to the testimony of Dyer, Doan advanced all of the money which was invested except comparatively small sums which for convenience were at times temporarily advanced by Dyer (Tr. 122, 123, 124).

The relations between the parties and the respective interests in the transactions which were conducted from August, 1918, until the end of May, 1919, are detailed by Doan (Tr. 176-184), from which it appears that Doan had absolute and full say as to how and in what manner the different properties should be acquired and sold; that he ad-

vanced out of his personal account moneys which were paid for these properties; and that during this time he consummated several transactions in which Dyer did not participate in any of the commissions which Doan earned.

It is deemed unnecessary to encumber this brief with a resume of this testimony for the reason that even though reference only be had to the testimony of Dyer it clearly shows that these transactions were not carried on by the parties as partners or under any partnership arrangement but that Doan was the principal in each transaction, supplying the capital, dictating the terms of purchase and sale, fixing the price of purchase and sale, determining all questions of policy; and that Dyer was compensated for services rendered in these transactions by a division of the commissions or profits earned.

Dyer was virtually an agent or employee of Doan and was compensated by Doan for services which Dyer rendered by a portion of the commission or profits which Doan earned in the several independent Texas and Oklahoma transactions, but Dyer was in no sense a partner.

Between August, 1918, and May, 1919, several independent deals were made in Texas and Oklahoma by Doan which Dyer was in a measure instrumental in consummating, but always under the direction of Doan. The first transaction was consummated in November, 1918, Doan acquiring leases in Bosque County, Texas, aggregating 8000 or 10,000 acres. Doan paid the seller out of his own

funds 50 cents an acre. The leases were assigned directly to Doan. Doan told Dyer that after the leases were sold and Doan had his money back he would give Dyer one-half of the profit. The leases were subsequently sold at a profit in Doan's name, by Dyer under power of attorney which Doan had given Dyer, and the profits were divided (Tr. 179).

The next transaction related to the acquisition of leased acreage in Stevens County, Texas. Dyer wired Doan, who was in California, for his consent to purchase that property and Doan wired him to do so and advised Dyer that Doan was prepared to pay the purchase price. Dyer advanced \$1250, and Doan repaid him one-half of this sum immediately upon his return to Fort Worth. This property was sold before the next payment became due and the profits were divided between the parties (Tr. 180).

The property which was next acquired was in Eastland County, Texas. The full purchase price was \$15,600. Dyer advanced the initial payment of \$500 and Doan paid the remainder of the purchase price, \$15,100. Dyer's \$500 was returned to him after the deal was closed. Mestre Olcott, witness for complainant, testified that the money received upon the sale of this property was deposited in the bank in Doan's favor (Tr. 99, 180). Doan did not deduct any of his expenses incurred in connection with this transaction (Tr. 191).

On May 5, 1919, a contract was made between Doan and W. J. Wallin (Plff. Ex. No. 45, Tr. 210)

to purchase a five acre tract known as the Burke-Burnett Tract. Dyer testified:

“Doan wanted me to look at that piece while I was up there (Wichita Falls) and he wired me not to lose it unless I saw something better.”

Dyer stated that the initial payment of \$10,000 was paid with Doan's money and that Doan paid the balance of the \$40,000. He testified as follows:

“I considered I had a half interest in that \$40,000 with Doan. I do not recall that Doan ever told me that I had a half interest in it” (Tr. 122).

This property was afterwards transferred to the Doan Oil Company and subsequently sold for \$50.00 (Tr. 181-2). While Dyer testified that he had advised Doan against making the payment of the \$30,000 balance due on the property this testimony is flatly contradicted by Doan and his son (Tr. 183, 289).

The testimony of Doan and his son is corroborated by that of Mr. Louis Titus, who testified that Dyer told him after the property had been purchased that it was a wonderful piece of property and he thought it very valuable (Tr. 202).

In the early part of May, 1919, Doan authorized Dyer to purchase one-half interest in property known as the Tillman County lease, which had been acquired by F. E. Couch. According to the testimony of Couch, Doan authorized Dyer to acquire one-half interest in this property for Doan and when he met Doan at Fort Worth later he told him

that if the title was all right he would pay the balance and when he came back to Fort Worth he (Couch) could give him his half. The property was subsequently sold at a profit and Doan was given a check for \$5400, representing half the sale price, less expenses (Tr. 87, 88, 91). Dyer testified that the title to this property was taken in the name of T. B. Owens and all Dyer advanced was some lawyers' fees (Tr. 121).

These attorneys' fees amounted to \$25 and were claimed by Dyer in his account, the account also showing that Dyer held in his possession \$2092.50, representing the portion of the amount received from the sale of this property (Tr. 384-5).

The manner in which these transactions were negotiated indicates clearly that there was no partnership relationship existing between the parties. All money invested in each transaction was paid by Doan, except the temporary small initial payments which were made on two of the transactions by Dyer and which were returned to him. In the acquisition of the Burke-Burnett piece for instance Dyer advanced only \$65 for attorneys' fees, while Doan paid \$40,000. Dyer testified that he did not recall paying out any money on any of the properties other than as shown by Plff. Ex. 36, 37, 38 and 39 (Tr. 165).

The account rendered by Dyer shows that all the money he advanced at any time aggregated \$2694.82, \$1000 of which is represented by an expense account which he presented to the Doan Oil

Company and which was disallowed by the Doan Oil Company and by the Master; and one-half of the automobile account aggregating \$1332.50, leaving but \$362.32 which he had advanced in connection with any properties acquired by Doan, his total claim under his account aggregating \$602.32 (Tr. 384-5); whereas the account rendered by Doan showed that from time to time he advanced \$311,665.50 (Tr. 339).

The Court's attention is directed to the testimony given by Doan (Tr. 176, 178, 179, 184, 217). The uncontradicted evidence supports and corroborates this testimony, which is to the effect that Doan was the "boss", dictated the terms of every transaction, advanced the money to acquire the properties, dictated the terms on which they should be sold, assuming the entire risk, and held title to the properties in his own name.

In other words each transaction was handled separately and distinct from the others. According to the testimony of Dyer in the deals on which a profit was earned Doan divided the profits with Dyer when the transaction was closed. But Doan at no time called upon Dyer to share any losses.

Had there been a partnership profits would, naturally, and in fact inevitably, have been applied to a partnership fund to be invested by the "partners" in subsequent transactions. In none of these transactions, and the same is true of any transaction subsequently held between the parties, was the title to property taken in the name of the firm

of Doan and Dyer or Dyer and Doan, or the name of any partnership. The uncontradicted evidence shows that the title to all the properties was vested in Doan. It was his money that paid for the properties, he assumed the entire risk and bore all the losses.

If either of the parties had any suspicion that they bore the relation of partners they would undoubtedly have taken the property in the firm name, the transaction would have been conducted in the name of the firm, and accounts would have been kept in the firm name and the partnership funds accumulated and applied in subsequent transactions as they occurred. As a matter of fact there was not at any time whatever any joint account, Dyer testifying that:

“No profits which we made in any joint venture were paid into any joint account.” (Tr. 124.)

Even though we indulge in the violent assumption that the testimony with reference to the agreement of “partnership” was as Dyer testified and leave out of consideration Doan’s flat contradiction of Dyer’s testimony and further, leave out of consideration the fact that the burden of proving a partnership by clear and convincing evidence rests upon Dyer, yet it must be held, in view of the manner in which the parties conducted business as hereinabove outlined, that at no time was there a partnership in any sense of the word. On the contrary it must be evident that either Dyer was an

employee of Doan receiving his compensation on the basis dictated by Doan or, on the other hand, and as was suggested by the Court in the original opinion (Tr. 14-16), they were joint adventurers in each of the separate and distinct transactions related in the evidence. This contention is supported and fortified by the fact that no question was made by Dyer to the several independent transactions which were conducted by Doan in his own name, special reference being made to the Wehr-Haywood Syndicate in which Doan invested \$1000 (Tr. 185). Dyer also testified that he had independent dealings with W. L. Leland in which he invested \$2000 of his own money and in which Doan had no interest (Tr. 94). He also testified that he sold some leases for Jergins in Archer County, Texas, in March, 1919, and received a commission (Tr. 118-19).

Relationship of the parties from May 30, 1919, to March 22, 1920.

There was a marked change in the relationship of the parties from the time Doan began operations in the State of Louisiana.

By the interlocutory decree the parties have been constituted partners and the term of the partnership defined as continuing from August, 1918, until March 22, 1920, notwithstanding the fact that on the 30th of May, 1919, Dyer entered into agreements with Captain J. F. Lucey and Doan to become president and general manager of the North Texas

Supply Company, a corporation thereafter immediately formed, at a salary of \$500 a month, and while acting in that capacity to devote his entire time and attention to conducting this business at Wichita Falls, forming at least two drilling companies and rig building companies; and that Dyer in August of that year made preliminary arrangements and in October or November entered into a final, independent contract with the American Oil Engineering Company to represent their interests in Texas and other states, at a salary of \$1000 per month, subsequently increased to \$1250 per month; and notwithstanding the admitted fact that Dyer did not invest a single dollar, nor devote an hour's time in furtherance of Doan's Louisiana interests.

If under facts such as are disclosed by the record in this case persons may successfully claim that they are a partner and entitled to the benefits accruing from such partnership, no one is safe in maintaining the most casual business relations without fear of jeopardizing their capital.

It is respectfully submitted that the interlocutory decree runs counter to the well established rule that a partnership can never be created by implication or operation of law apart from the express or implied intention and an agreement to constitute the relation.

We believe that the facts relating to Doan's Louisiana venture fully bear out these contentions. Doan testified that he went to Louisiana in April or May, 1919, where he purchased out of his own

funds 40 acres in Bull Bayou field from Clark & Grier, and that Dyer was in California at the time the purchase was made.

Mr. Louis Titus was the only party interested with Doan at the time this purchase was made although Captain Lucey, as it will subsequently appear, also became interested. Doan testified that some time during April or May he told Dyer he was going to operate in Louisiana in association with Mr. Titus and that the proposition in Louisiana would be on an entirely different basis from any deals they had had before and that Mr. Titus would be interested with him in everything in Louisiana (Tr. 185).

He told Dyer that on account of the business subsiding and excitement ending it was a dangerous thing to speculate in leases, evidently having in mind the disastrous Burke-Burnett purchase and that he would not venture further in that deep territory for fear he would be unable to sell the leases. At the time Mr. Titus and Doan went to Louisiana Dyer knew that they intended to make the trip but he was not invited to go. Titus and Doan spent several days in Louisiana and bought an additional piece of property for \$110,000 upon which they made an initial payment of \$10,000 with the joint funds of Doan and Titus. The balance of this money was paid by the Doan Oil Company, a corporation subsequently formed.

“Dyer paid no part of the purchase price and had nothing to do with that transaction.” (Tr. 186.)

Doan thereafter returned to Fort Worth, Texas, met Captain Lucey, Mr. Carr and his son. They made a trip to Wichita Falls and upon their return met Dyer in his room at the Fort Worth Club. The uncontradicted evidence shows that at this meeting the details of the supply business were explained to Dyer by Captain Lucey who enlarged upon the advantages which would accrue to Dyer by engaging in such a business, including a salary of \$500 a month (Tr. 188). Doan advised Dyer to accept the proposition and later had a conversation with him at which Doan and Dyer alone were present. At this conversation Doan told Dyer that he had absolutely concluded that Dyer could not go to Louisiana, that this was an operation for Messrs. Titus, Lucey and himself.

The conversation between the parties is further detailed by them (Tr. 190, 191, 211-13), and is to the effect that if Dyer would fulfill his obligations under his contract with Captain Lucey, organize the California syndicate, organize two subsidiary drilling companies and rig building companies, which were a part of his agreement with Lucey, that Doan would carry Dyer for an interest in Louisiana. The arrangements made between Lucey and Dyer are corroborated by testimony of Mr. A. J. Carr who was present with them at the time the arrangements were made. He testified that the arrangement was that Dyer was to go to Fort Worth and not only manage the North Texas Supply Company but form contracting drilling companies and a rig building company, and that

Dyer might transact other business at Wichita Falls that did not interfere with the business of the North Texas Supply Company in that territory, and that Dyer

“was to devote all of his time to those particular things that they agreed upon in that particular territory” (Tr. 277).

This testimony is further corroborated by the testimony of L. E. Doan, Jr., who was present at the time the arrangements were made between Lucey and Dyer (Tr. 285).

This evidence is further corroborated by Defendant's Exhibit “H” (Tr. 286) memorandum in Dyer's handwriting showing how the North Texas Supply Company was to be organized; that Dyer was to be president and subscribe for 10,000 shares of the stock.

There is marked conflict in the testimony as to the terms of the agreement made between Doan and Dyer at the time Dyer assumed the presidency of the North Texas Supply Company. But we believe that the evidence admits of no other conclusion than that Doan's testimony is correct. Dyer testified that Doan went to Louisiana the latter part of April, 1918, and when he returned advised him that he had made a deal on the Giffin well and also a 40-acre tract in Bull Bayou; that Doan told him that they would make some money out of it; that Dyer suggested selling it and Doan said:

“No, Louis Titus is coming out shortly, and we had better wait until he gets there and see what he thinks about it.”

Dyer further testified that Doan told him when the Doan Oil Company was organized and that after the formation of this company Doan said to him in the Forth Worth Club:

“We have arranged to make a \$300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece” (Tr. 116-17).

On cross-examination Dyer testified:

*“I had nothing to do with that transaction. I knew nothing of it except what Doan told me at that time * * *. What Doan told me about the Louisiana property is practically all I know”* (Tr. 122-23).

Doan's denial of Dyer's testimony about the formation of the \$300,000 pool and permitting Dyer to have a one-sixth interest in it (Tr. 274) is completely corroborated by exhibits introduced by counsel for appellee and by the testimony of Mr. Louis Titus. Complainant's Exhibit No. 7 (Tr. 130, et seq.) is a letter from Doan written at Shreveport, Louisiana, and addressed to Dyer under date of October 12, 1919, wherein Doan stated:

“While there is a big boom on here I have not seen any thing that I could recommend to your crowd—that we cannot handle ourselves—and as I said before I cannot afford to mix up with you on any outside deals in Louisiana.”

Both Mr. Titus and Mr. Doan testified that during the early part of May, 1919, after Titus and Doan had made their first trip to Louisiana, Dyer, Titus and Doan had spent three days traveling about Texas, looking at various oil fields, and that

they discussed various oil properties in Texas but that there was no conversation relative to the Louisiana properties (Tr. pp. 202, 186).

If the fact had been that Dyer was at all interested in Doan's and Titus' Louisiana venture, it seems strange that during the three days' conversation they did not mention anything concerning this territory, especially when consideration is given to the fact that in order to sustain the theory of appellee's counsel two new partners, Titus and Lucey, must have been admitted to the "partnership" without the knowledge, however, of the two partners.

Doan's refusal to permit Dyer to have anything to do with Doan's Louisiana venture is further corroborated by the testimony of Mr. Titus who unequivocally denied Dyer's evidence wherein he testified that Titus had said to Dyer: "Why are you not down in Texas?" or "Doan needs you," or "I am going down there and I am going to have Doan send for you at once because you should both be there together" (Tr. 204). But on the contrary Mr. Titus testified that during July, 1919,

"Dyer stepped into my office, and I said to him, 'What are you doing here, I thought you were in Texas?' He replied that he had some affairs to attend to, and he had come up to California. I said, 'Are you going to stay here long, and when are you going back to Texas?' And he replied, 'I do not want to go back to Texas; I want to go to Louisiana, but Larry won't let me go; he wants me to stay in Texas'" (Tr. 202-203).

To say the least it is strange that if the parties bore the relation of partners in July and August, 1919, that one of the "partners" would rest content while his "partner" told him he could not visit the scene of the partnership's activities.

The evidence shows without conflict that from the time Dyer agreed with Messrs. Lucey and Doan to undertake the management of the business of the North Texas Supply Company Doan exclusively devoted his entire time and attention to the affairs of the Doan Oil Company in which Messrs. Titus, Lucey and Doan were jointly interested, and that Dyer had nothing whatever to do with these operations.

Reference has already been made to the evidence concerning the acquisition by Doan of properties in Louisiana fields which were paid for by the joint funds of Titus, Lucey and himself.

For convenience in acquiring, holding and developing their Louisiana properties Messrs. Titus, Lucey and Doan on June 30, 1919, formed a corporation known as the Doan Oil Company, with an authorized capital stock of \$500,000, divided into 500,000 shares, of the par value of \$1.00 each, the original incorporators being Messrs. Titus, Lucey, Raymond, Doan and Thigpen (Tr. 169). Subscriptions were made and shares of the corporation issued as follows: Louis Titus, 150,000 shares; J. F. Lucey, 50,000 shares; L. E. Doan, 98,000; S. S. Raymond, 1000 shares; and J. A. Thigpen, 1000 shares (Tr. 171). The shares issued to Thigpen and

Raymond were for the purpose of qualifying these parties as directors. Their stock was subsequently returned to Doan. Doan testified that he paid \$93,000 cash for 93,000 shares and made up the balance by applying to this account the \$7000 salary which had been voted him by the directors, and which he had received at the rate of \$1000 a month (Tr. 343). There was no promotion stock but the stock was issued to Messrs. Louis Titus and J. F. Lucey and L. E. Doan in proportion to the amount of money which they invested (Tr. 345).

It conclusively appears from the evidence that Dyer did not invest a single cent in Doan's Louisiana venture, but that the capital employed in acquiring and developing these properties was supplied by Messrs. Titus, Lucey and Doan. *Dyer testified:*

"I never invested one cent individually in any of these projects of Doan's."

Dyer further testified that he even did not know how much money Doan had invested in Louisiana except that Doan told him that he had invested \$100,000 (Tr. 126-7).

It further appears conclusively that Dyer had nothing whatever to do with the acquisition, management or development of the Louisiana properties and that Doan expressly forbid him to have anything to do with the Louisiana properties (Tr. 187, 203).

THE CORRESPONDENCE PASSING BETWEEN THE PARTIES
SHOWS THERE WAS NO AGREEMENT OF PARTNERSHIP
AND THAT THEY WERE EACH ENGAGED IN INDEPENDENT
VENTURES.

The several letters addressed by the parties to one another during the time Doan was engaged in developing the Louisiana properties in which Messrs. Titus, Lucey and himself had invested their independent capital, during which time Dyer was in the employ of both the North Texas Supply Company and the American Oil Engineering Company, conclusively show that the parties were not partners but that on the other hand they were each engaged in independent ventures.

In analyzing these letters attention must be given to the dates at which and the points from and to which they were addressed.

Plaintiff's Exhibit No. 7 (Tr. 130) is a letter addressed by Doan to Dyer from Shreveport, Louisiana, under date of October 12, 1919. In this letter Doan says:

“While there is a big boom on here I have not seen anything that I could recommend to *your* crowd. That we cannot handle ourselves—and as I said before *I cannot afford to mix up with you on any outside deals in Louisiana.*”

He goes on to speak about the Louisiana operations and where Doan employs the word “we” it is apparent he is referring to Messrs. Titus and Lucey who were at that time his associates. This is emphasized by the fact that in the latter portion of the

letter Doan begins: "*Now in regard to yourself.*" Doan gives Dyer some advice with reference to remaining at Wichita Falls and not making a trip to California every 60 days and adds:

"If *you* will get down to brass tacks—and put *your* head to work *you* will make a killing. There are plenty of good opportunities—just as good as here. Just forget about this thing over here. I think I am capable of handling it and there is no room at present for two of us."

Counsel for appellee in arguing the case before the trial Court placed great dependence upon other letters addressed by Doan to Dyer during the time Doan was engaged in his Louisiana operations. He claimed that these letters supported his contention that a partnership existed between the parties during this time but an analysis of these letters will bear out the testimony of Dyer himself that he did not remember any conversation as to whether Doan intended to carry him for a particular interest (Tr. 129).

In a letter addressed by Doan to Dyer dated June 23, 1919, it clearly appears that Doan was endeavoring to induce Dyer to fulfill the agreement which he had made with Captain Lucey. He speaks about subscription to stock of the North Texas Supply Company which was made by each of the parties independently at the time this corporation was formed; and told Dyer that Captain Lucey

"would like *you*, however, to subscribe for 10,000 additional—and if *you* can borrow the money I would advise *you* to do it. I will pay

mine whenever *you* require it. When the 50% is paid in you will be able to make a statement to banks, which will give *you* borrowing capacity. Cap is very enthusiastic about *your* company and has given positive orders to take care of your wants" (Tr. 135).

Complainant's Exhibit No. 9 (Tr. 136) relates to a transaction consummated prior to the time Doan began his Louisiana operations. Complainant's Exhibit No. 10 (Tr. 137) addressed to Dyer prior to the time the North Texas Supply Company was formed and Doan began his Louisiana operations. In this letter Doan advised Dyer of opportunities which he might take advantage of in Texas. No suggestion of any joint interest.

Plaintiff's Exhibit No. 11 (Tr. 138-9) relates in the main to transactions which were consummated prior to the time Doan began his Louisiana venture.

Counsel for appellee stresses the "our" and "we" that appear in this letter as these terms are employed by Doan but when consideration is given to the fact that, according to the testimony, Doan had agreed to carry Dyer for an undefined interest in the event Dyer would successfully manage the North Texas Supply Company's business; and that the parties at the time this and other letters were written were upon the most intimate and friendly terms; and also to the fact that the "we" and "our" in practically all of the letters refer to the interests which were represented by Titus, Lucey and Doan, it is apparent that these words as employed by Doan relate to the interests of Titus, Lucey and him-

self. The same observations may be made with reference to Complainant's Exhibits Nos. 12 and 13. It also clearly appears from complainant's Exhibit No. 12 that the parties were acting entirely independent of one another and it may be observed that in these letters Doan constantly refers to Dyer's stock holdings in the North Texas Supply Company as "*your* stock" and states:

"*You* can easily borrow money on this stock and I think *you* had better do it." "It will look better and *you* are taking no chances" (Tr. 141, 143).

In so far as the drilling operations were concerned Doan stated:

"*My* second rig will be here by the 1st of October, and *I* will have two of our own going—a little later I could probably use *your* rig but *you* will have no trouble in getting a contract. The only trouble *you* will have will be in getting casing" (Tr. 144).

It also appears throughout these letters that Doan was endeavoring to put Dyer in possession of all possible information as to developments in order that Dyer might in turn keep his "California crowd" advised. This particularly appears from Complainant's Exhibit No. 14 (Tr. 145), letter addressed to Dyer by Doan from Shreveport, February 15, 1919, wherein it is said:

"It might be a good opportunity for *your* California bunch and *I* will probably take some for the Doan Oil Company."

By reading the next to the last paragraph of the letter it will be seen that when he is speaking of "our" and "we" he certainly is referring to Messrs. Titus and Lucey and his Louisiana associates. He speaks of "our" well in Bull Bayou and said "we", evidently referring to the same persons to whom he referred by "our",

"are having just as much trouble here hunting freight as *you* are in Wichita."

The same observations may be made with respect to complainant's Exhibit No. 16, letter addressed by Doan to Dyer, from Shreveport, October 14, 1919 (Tr. 148), where he speaks about the North Texas Supply Company voting stock to Dyer: "*You* can easily borrow" money to take up your subscription. The Court's attention is directed to Complainant's Exhibit No. 17, being a letter addressed by Doan to Dyer from Shreveport, Louisiana, under date of November 7, 1919, and the manner in which the words "our" and "we" are employed. There can be no question as far as this letter is concerned that the words "we" and "our" used in this letter refer to Mr. Titus and Mr. Doan (Tr. 150-51).

The points from which these letters were addressed and the points to which they were addressed bear out the statement that Doan was devoting practically his entire time to the development of the Louisiana properties, whereas Dyer was seldom at Wichita Falls but upon some occasions was in

Fort Worth and the remainder of the time in California, New York and other eastern points.

It may be noted in passing that Complainant's Exhibit No. 18 (Tr. 152), letter addressed from Shreveport by Doan to Dyer, January 8, 1920, relates to the "Santa Maria Syndicate", which was formed long prior to the time Doan began his Louisiana operations. The Court's attention is directed to the fact that many of the letters and telegrams offered as complainant's exhibits have no bearing upon the case for the reason that they bear date prior to the time of the beginning of the alleged partnership, or in the present connection relate to a time prior to the time the understanding was made between Doan and Dyer in May, 1919. As an instance we refer to Complainant's Exhibit No. 19 (Tr. 153). Complainant's Exhibit No. 20 has no significance in relation to the case except to show that in July, 1919, Dyer was in San Francisco instead of Wichita Falls. Same is true of Complainant's Exhibit No. 21. Complainant's Exhibit No. 22 (Tr. 154) relates to a meeting with Carr who was in charge of the activities of the Lucey Manufacturing Company and relates to business between that company and the North Texas Supply Company.

Complainant's Exhibits 23, 24, 25 and 26 (Tr. 155-6) also relate to the same subject matter.

Complainant's Exhibits 27, 28, 29, 30, 31 (Tr. 157-8) have no bearing upon the case except to show that on November 8th Dyer was in Chicago, No-

vember 11th in New York, November 25th and 27th in Los Angeles.

Complainant's Exhibit No. 33 (Tr. 159) telegram addressed by Doan from Shreveport, Louisiana, December 19, 1919, to Dyer, Pennsylvania Hotel, New York, is important in showing that Dyer was again absent from Wichita Falls and particularly that there was no partnership fund and that the interests of the parties were measured by their own independent holdings. In this wire Doan asks Dyer to send him \$6000 which Doan advanced on behalf of Dyer on account of the Santa Maria well. If there had been a partnership between the parties this account of course, and the indebtedness of Dyer to the partnership, would not have appeared as a personal obligation from Dyer to Doan.

Complainant's Exhibit No. 47 relates to a period of time prior to the time Doan began his Louisiana operations and likewise Complainant's Exhibits Nos. 51, 52, 53, 54 and 55, telegrams from Doan to Dyer, all were transmitted prior to this time and related to Texas deals which had previously been made.

Complainant's Exhibit No. 58, telegram in which Doan advised Dyer that everything in the fields looks encouraging. Complainant's Exhibits Nos. 59, 60, 61, 62, 63, 65, 66, 71, 72 and 73 related to the business of the North Texas Supply Company and general advice about the Louisiana properties. It is natural that Doan should advise Dyer of these mat-

ters because he had agreed to carry Dyer for an interest in the Louisiana purchase in the event Dyer successfully managed the North Texas Supply Company, Doan being indirectly interested in the North Texas Supply Company, and his son also having an interest in that company.

Complainant's Exhibit 69 relates principally to negotiations which were being carried on by Dyer relative to the properties which Doan had acquired prior to the time he became interested in Louisiana. Complainant's Exhibit No. 70 is an invitation for Dyer to visit the fields, advising the general condition of the Louisiana property. No. 75 is a letter directed by Doan to Dyer under date of February 10, 1919, prior to the time he became interested in the Louisiana properties (Tr. 239).

Letter addressed to Doan to Dyer under date of September 1, 1919, Complainant's Exhibit No. 76 (Tr. 241) advises Dyer of the general situation in Louisiana and the same is true of Complainant's Exhibits No. 77 and No. 78, it being natural for Doan to keep Dyer advised as to progress in the Louisiana fields as Doan had promised to carry Dyer for a contingent interest in that project.

Complainant's Exhibit No. 79 (Tr. 247), letter addressed by Doan to Dyer under date of October 25, related to the business of the North Texas Supply Company and refers to a proposed sale to the American Oil Engineering Company, which Dyer had suggested. In this particular Doan testified that he did not know at this time that Dyer had

accepted employment with the American Oil Engineering Company.

Complainant's Exhibit 80 (Tr. 248) speaks about Titus and Doan deciding what they were going to do with reference to the Louisiana properties. Appellee's counsel endeavors to count Dyer "in" on the "we" appearing in this letter but it is apparent that "we" refers to Titus and Doan.

In none of these letters or telegrams is the word "partner" or "partnership" employed, nor is there any reference to any joint interest, joint account, joint assets, anything relating to a division of profits or the sharing of losses, nor one word or syllable with reference to defining the parties' respective interests as partners, nor does Doan in any of the letters or telegrams addressed to Dyer even go so far as to ask Dyer's advice. There is no suggestion that he at any time asked Dyer's consent. The letters are all extremely friendly in tone, acquainting Dyer very generally with the progress of Doan's operations such as one friend who had the interest of another at heart might address to another.

Doan's friendship for Dyer is evidenced by the fact that he had loaned money repeatedly without security, at times as much as \$10,000 or \$12,000, and assisted him in many ways for several years, even going so far as to establish credit for Dyer at the Anglo Bank in San Francisco and Central National Bank in Oakland (Tr. 263) ,

Throughout the testimony of Doan it is shown that he repeatedly undertook to give Dyer advice which would make to the interest of Dyer, and his acts show that he did everything possible within his power to enable Dyer to make a success.

UNTIL THE FILING OF THIS SUIT DYER NEVER CLAIMED THAT ANY PARTNERSHIP RELATIONSHIP EXISTED BETWEEN DOAN AND HIMSELF, BUT ACCORDING TO HIS OWN TESTIMONY ONLY CLAIMED AN INDEPENDENT PERSONAL INTEREST IN ONE-SIXTH OF THE STOCK OF THE DOAN OIL COMPANY.

While Dyer testified that before Doan began operating in Louisiana Doan told him:

“We have arranged to make a \$300,000 pool. Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece” (Tr. 117),

this conversation was denied by Doan (Tr. 274). However, taking Dyer's testimony at its face value for the purpose of the argument, and assuming that this was the agreement between Doan and Dyer, it cannot be held that Dyer and Doan were interested in Louisiana operations as partners. According to the last quoted testimony Doan and Dyer were to take one-sixth apiece. If Dyer had any interest in the Doan Oil Company or in the \$300,000 pool which he testified Doan told him was to be formed, it was as an individual and not as a partner.

Dyer testified that he had never invested one cent individually in any of these projects of *Doan's* (Tr. 126). Doan testified positively that he had agreed

to carry Dyer for an undefined interest in the event Dyer kept his agreement with Captain Lucey and himself and went to Wichita Falls, remained there and successfully conducted the business of the North Texas Supply Company, and formed the subsidiary companies (Tr. 190). This positive and unqualified statement is met by the equivocal statement made by Dyer in response to question asked by his counsel on his redirect examination:

“As to any conversation with Doan about his carrying my interest in the Doan Oil Company for a percentage, I don’t remember of holding such conversation with him on that particular point. I talked with him so many times about it, but I don’t remember of a conversation on that point of whether he would carry me for any particular interest. I told him I would have to give Fleishhacker a quarter of it if I got the money from him. Doan said he did not want them to share one bit of it” (Tr. 129-30).

According to this testimony Dyer was not proposing to raise one-half or any part of the amount that had been invested by Doan in the Louisiana operations and pay it into a partnership fund and hold the properties, but he was proposing, according to his own testimony, to borrow this money from Mr. Fleishhacker and give him one-fourth of this for the accommodation of the loan. This is a strange transaction as between “partners”. Dyer’s testimony upon cross-examination with respect to the Oklahoma deal, which was consummated prior to the time Doan began operating in Louisiana, shows

conclusively that Dyer did not claim an interest in the Doan Oil Company as a partner with Doan or otherwise. According to the transcript Dyer stated:

“I received a check representing one-half of the sale price of the last parcel of the Oklahoma deal; I think it was \$2090. I have not paid any portion of that money to Doan. I kept the last check and wrote him a letter that I had received this check and that he had not stated definitely whether the Oklahoma deal was our personal deal, or whether it had gone into the Doan Oil Company, and I was holding that subject to *our* settlement” (Tr. 164-5).

What can Dyer possibly have meant by saying that he was holding this money which represented one-half of the sale price of the last piece of the Oklahoma deal, “subject to our settlement”. According to the arguments of counsel for appellee whenever the word “our” is used in any sense whatsoever it relates to Dyer and Doan. Perhaps the same argument may be employed in this connection.

There is not one syllable of testimony to the effect that Dyer at any time offered to pay any money to Doan on behalf of any “partnership” in connection with the Louisiana properties, but Dyer consistently testified that he was entitled to his one-sixth interest. In response to questions asked him by his counsel Dyer testified:

“I have never received the one-sixth interest *in the Doan Oil Company*. I demanded it many times. The final demand was in March, 1920, when I went to Shreveport” (Tr. 119).

This claim to an undivided one-sixth interest in the Doan Oil Company was insisted upon by Dyer up until the date the trial Court held the "partnership" was dissolved.

Doan testified that on January 21, 1920, Dyer first told him that he had become associated with the American Oil Engineering Company. This conversation was at Fort Worth and Dyer stated to Doan that he wanted to know what his interests were in the Louisiana operations, that he wanted them settled. Doan told Dyer that he had violated his contract with the North Texas Supply Company; that he had not organized his California oil company; had not subscribed to his stock in the North Texas Supply Company; had not earned his bonus stock; and that Dyer was not entitled to anything. Dyer replied:

"I can raise the money to take my interest in the Doan Oil Company. I have always been ready to do it."

Doan replied that he had not been ready to do so and could not do it, and that he had never offered to do it. At that time Doan told Dyer that he was obliged to borrow some money and that if Dyer would pay him what he had advanced Dyer in California, and if Dyer would purchase his North Texas Supply Company stock and pay Doan \$1 a share for the Doan Oil Company stock, which was the price Doan paid for it; that he would give Dyer 50,000 shares of stock in the Doan Oil Company. Dyer agreed to do so and at that time wrote out a

check in favor of Doan for \$3000, representing one-half the amount due upon the advance made by Doan in California, and agreed to send \$3000 the following day. He promised that he would purchase the North Texas Supply Company stock (Tr. 191-3).

Letter written by Dyer from Fort Worth, Texas, addressed to Doan at Shreveport, La., under date of January 21, 1920, upon the stationery of the American Oil Engineering Company, Defendant's Exhibit "C" (Tr. 195), corroborates this proposed arrangement between the parties and shows conclusively that Dyer did not fulfill his part of the agreement. In this letter Dyer stated:

"I am going to hold off the getting of the \$50,000 until the last minute after you have had your meeting with Mr. Titus and decided on your policy. I will not do this to inconvenience you but for the purpose of being guided in getting my money. It will of course be necessary for me to give up a small piece of it in order to get this money but should you decide on a sale policy, either of land outright or stock that would reimburse present holders, I naturally would want to take advantage of that and not give up any interest other than is necessary. This feature dawned on me after you left last night and I wanted to explain it to you for your approval" (Tr. 195).

Under date of January 23rd Doan addressed a letter to Dyer, acknowledging the receipt of Dyer's letter of the 21st, and stating:

"If you are unable to arrange for your money by the first of February we will have to change

our plans somewhat because—I will have to raise some money at that time and I am depending on you. Let me know at once so I can make my arrangements accordingly. * * * If you have to give up one-quarter to raise your money I will do it for you on the same basis. Let me know by return mail what you want to do about it” (Defendant’s Exhibit “D”, Tr. 196-7).

On January 26th Dyer made reply to Doan’s letter upon letterhead of the American Oil Engineering Company, in which he stated:

“I have your letter of the 23d and I explained to you when you were here, it was agreed that I could obtain this money by giving the one-fourth interest mentioned. You ask me to write by return mail and state that you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis as it would eliminate having any outsiders or any complications. If this is agreeable to you, please drop me a line and I will go no further to obtain this money on the outside. I want this absolutely agreeable to you either way and if you prefer to have me get the money advise me and I will get it at once” (Defendant’s Exhibit “E”, Tr. 197-8).

On February 9th Dyer again addressed Doan on letterhead of American Oil Engineering Company, stating:

“I have not had a letter from you in answer to my last letter asking if it was agreeable as you had mentioned on the carrying of *my* Doan Oil Company interest. When you get time I would like to know how things are going with you” (Defendant’s Exhibit “F”, Tr. 199).

These letters confirm the contention hereinbefore made that at no time following the conferences in May, during which Dyer agreed to confine his activities to the management of the North Texas Supply Company, form a subsidiary company at Wichita Falls, did Dyer ever offer to contribute any sum at all to any partnership fund, but that from the beginning he was consistent in his statements concerning the original agreement that he was to receive and hold an undivided one-sixth interest in the Doan Oil Company, not an interest in any partnership. The uncontradicted evidence shows that Dyer in no way and at no time participated at all in the acquisition or development of the Louisiana properties and that according to the testimony of Doan, corroborated by Mr. Titus, Doan would not even permit Dyer to go to Louisiana.

The testimony of the appellee proves that no partnership existed at any time. In the absence of a community of capital, or property, and in view of the fact that Dyer had no control of the business and never undertook to determine a question of policy or the terms upon which any property should be acquired or developed, and with no attempt at any time by either of the parties to bind the other, there being no joint fund or partnership account, no obligation resting upon Dyer to pay any part of the purchase price of any of the properties; no joint ownership of partnership funds or joint right of control, it cannot be held the intention of the parties was to create a partner-

ship. This is especially true when consideration is given to the fact that Dyer, according to his own testimony, never contributed a cent to the acquisition or development of Doan's Louisiana properties, and never devoted an hour's time to them, but spent his time traveling about the country, neglecting his duties as president and manager of the North Texas Supply Company; entering into a separate contract of employment with the American Oil Engineering Company, and, according to his own testimony, became "one of their family". The uncontradicted evidence shows that during all of this time Doan devoted his entire time and attention in acquiring and developing his Louisiana properties, paid \$100,000 for the property and work done thereon, and assumed the entire risk of any loss.

It must be held that all the essential elements of a partnership are lacking in the agreement, express or implied, between Doan and Dyer. There was no joint fund. Dyer contributed no money to the "partnership". The only thing he had to say about financing was to offer to pay Doan in January, 1921, \$50,000 to acquire one-sixth interest in the Doan Oil Company. He testified that in order to obtain this money he would be obliged to give up one quarter of it to Mr. Herbert Fleishacker. He had no say whatsoever in the conduct of the business and Doan would not consent to his going to Louisiana. There was nothing to show that the parties had authority to bind one

another or ever undertook to bind one another. There never was any agreement on behalf of Dyer to share in any of the losses. He did not devote a single hour of his time to the business of the partnership, although he alleges in his complaint that the parties were to devote their entire time and attention to the business.

The test to be applied in determining whether a partnership existed between the parties is to determine whether, in the event Doan's Louisiana venture had been a failure, Doan could have enforced a claim against Dyer for the return of one-half of the \$100,000 which Doan advanced or one-half of any loss which Doan might have sustained. There is nothing in the evidence to warrant a finding that Doan could have recovered in such event.

A partnership relating to the Louisiana operations can not be proven unless Messrs. Lucey and Titus are included as members of the partnership.

Dyer testified that after Titus, Lucey and Doan returned to Fort Worth from Louisiana Doan said:

“We have arranged to make a \$300,000 pool. Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece” (Tr. 117).

This testimony is denied by Doan (Tr. 274). This testimony of Dyer embraces all the evidence relating to any agreement relative to a partnership concerning the Louisiana properties. According to the testimony of Dyer the parties had been operating as “partners” in Texas and Oklahoma

under the agreement that Dyer testified was made between Doan and himself in San Francisco. If Dyer acquired an interest in this \$300,000 pool Messrs. Lucey, Titus, Doan and Dyer virtually formed a partnership. Two new members were admitted into the "firm". There is no evidence that either Mr. Titus or Captain Lucey agreed to Dyer's becoming a partner or that they had any knowledge that he was to have a one-sixth interest in the Louisiana properties. In fact the testimony of Doan (Tr. 186-190) Doan, Jr., (Tr. 283-286), Carr (Tr. 275-277), and Dyer himself (Tr. 298,9) negatives any such assumption. The fact that Messrs. Titus, Dyer and Doan made a trip through the Texas fields lasting for three or four days, and that there was no conversation on the entire trip relative to Louisiana, is conclusive on this point (Tr. 202). It seems unnecessary to cite authorities in support of the contention that in the absence of an agreement on the part of both Messrs. Titus and Lucey they did not become a partner of Dyer's because the Civil Code of the State of California provides, Section 2397, that

"Partnership can be formed only by the consent of all the parties thereto and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof."

The appellee has never made the claim that Messrs. Titus and Lucey were partners with himself and Doan in the Louisiana venture but if there was a partnership during this time it must be held under

the testimony of Dyer himself that the members of the partnership were Titus, Lucey, Dyer and Doan. The evidence does not warrant the finding of any such partnership having existed.

The evidence of appellee's witnesses is not sufficient to prove a partnership.

Appellee has undertaken to prove that there was a partnership by introducing testimony of several witnesses to the effect that Doan made admissions that Dyer and himself were partners. Mr. F. L. Keller, witness for complainant, testified that some time *after January, 1920*, he met Doan with Mr. Frank Berry and Doan said that Dyer was with him in the oil business and he was going to make him a lot of money (Tr. 83).

Mr. H. F. Berry testified that he had a conversation with Doan between *January 20 and 25, 1920*, and that Doan said Dyer was his partner (Tr. 82). The testimony shows that on January 21, 1920, Doan and Dyer agreed that if Dyer would pay to Doan the \$6000 which Doan advanced to Dyer in California; take his North Texas Supply Company stock and pay Doan \$1 a share, that Doan would transfer 50,000 shares of Doan Oil Company stock to Dyer (Tr. 193-4). Defendant's Exhibit "C", letter Dyer to Doan, January 21, 1920 (Tr. 195); Defendant's Exhibit "E", letter Dyer to Doan, January 26, 1920 (Tr. 197); Defendant's Exhibit "F", letter Dyer to Doan, February 9, 1920 (Tr. 198).

It is impossible to reconcile the testimony of Mr. Berry with the uncontradicted evidence of Doan, corroborated and supported by the exhibits to which we have last referred. It is improbable that Doan would make any such statements at the time or after the time he had made these compromise arrangements with Dyer.

Mr. Jacob Berger testified that Doan said Dyer was interested in the Bull Bayou production (Tr. 84). F. E. Couch testified for appellee that at one conversation between July or August, 1919, Doan stated that he and Dyer were going to make a lot of money down there in Louisiana (Tr. 90). Mr. W. L. Leland, witness for appellee, gave like testimony (Tr. 93-4). Mr. Mestre Olcott, witness for appellee, testified that Doan had told him that he was going to take care of the Louisiana end of the business and Dyer the Texas end of the business (Tr. 99). Mr. E. J. Buckingham, witness for appellee, testified that in February, 1920, he asked Doan if Dyer and Doan were still partners and Doan replied:

“Yes, we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end” (Tr. 101).

According to the testimony of this witness this conversation was had after Dyer had agreed to repay Doan the moneys which Doan had advanced and it is difficult to reconcile this testimony with the undisputed evidence contained in the letters of Dyer and the testimony of both Dyer and Doan to which reference has been made.

Mr. L. E. H. DeSallier, witness for appellee, stated that in March or April, 1919, Doan stated he could not reach any decision and for him to see Dyer, his partner (Tr. 101). This did not relate to the Louisiana properties which had not been acquired by Doan at that time. This character of testimony is attempted to be supported by the testimony of Mr. A. T. Jergins, witness for appellee (Tr. 103-5). Doan having stated, according to this witness' testimony, that in connection with the deal in Comanche County he would have to take the matter up with Dyer who this witness claims Doan stated was his partner, this conversation having been had some time between April and July, 1919 (Tr. 103-5).

This testimony relates to a transaction wholly disassociated from the Louisiana venture. Doan denied that he had referred to Dyer as a "partner" and that he had never used this word in any business transaction and also denied that he had used this word in connection with his conversation with Mr. H. F. Berry. The testimony of Messrs. L. I. Coggins, and Joseph Martin with reference to a statement that they would see the names of Doan and Dyer on some tank cars is far fetched and cannot add weight to the claim which appellee endeavors to support by this character of testimony.

The authorities clearly hold that under the facts disclosed by the record in this case the parties were not partners.

Actual intention is necessary to constitute a partnership and it was held by the Supreme Court

of the State of California that there must be a joint understanding to share the profit and loss and that each party must by agreement in some way participate in the loss as well as the profits; and that where there was an agreement for a party under power of attorney to obtain patents in foreign countries, and in consideration for the services to share in one-half the profits, there was no partnership. As in the case at bar it was held that the essential elements of a partnership *inter se* are wanting and that there is no community in capital stock, profit or loss.

Wheeler v. Farmer, 38 Cal. 203, 213, 214, citing cases.

It has been held that

“persons who share profits and losses are in my opinion properly called partners but that is a mere question of words. Their proportionate rights in any particular case must depend upon the real nature of the agreement into which they have entered”.

Coward v. Clanton, 122 Cal. 451, 454-5.

By referring to the agreement which Dyer testified was made between Doan and himself, as far as the Texas ventures were concerned (Tr. 109); and also to his testimony relating to the “agreement” concerning the Louisiana properties (Tr. 116-17), and leaving out of consideration for the purpose of the argument Doan’s testimony denying these agreements, the rule announced in the case last cited is conclusive upon the question of partnership.

“As between the parties partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct.”

Morgart v. Smouse, 103 Md. 463; 7 Ann. Cas. 1140; 63 Atl. 1070; 115 Am. St. Rep. 367.

“A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation. * * * Even where the parties agree to enter into a joint enterprise and share in the profits, a partnership, as between themselves, does not necessarily result. The intention of the parties always controls.”

Reed v. Engel, 237 Ill. 628; 86 N. E. 1110, affirming 142 Ill. App. 413.

“Whenever in an action between two persons alleged to be partners, a partnership is sought to be proved, the decision of the question depends entirely upon the intention of the parties as legally ascertained. That does not mean a mere arbitrary intention. If the terms of the contract between the parties are fixed and certain, the question of partnership is usually a question of law to be decided upon the construction of the contract, and in such a case the declarations of the parties outside the contract as to the nature of the agreement which it was their intention to form would be of little weight. But unless in some manner it is found to be the intention of the parties that they should become partners, then the partnership cannot be said to exist.”

Heye v. Tilford, 2 App. Div. 350; 37 N. Y. S. 751.

The case of *Lynden v. Spohn-Patrick Company*, 155 Cal. 177-180, supports appellant's contention that these "agreements" which Dyer claims Doan and he made did not constitute the parties partners as far as the Texas transactions were concerned. In the case cited, as in the case at bar, the party claiming a partnership,

"was to have no title to any of the property and was not liable for any of the debts. His entire interest in the business consisted in his right to receive one-half of the profits as his compensation".

Reynolds v. Jackson, 25 Cal. App. 490;

Jones v. Title Guaranty Co., 178 Cal. 375-378.

Where parties agreed that the profits of a certain business carried on by A and B were allowed to B for his services, it was held that there was no partnership but a mere participation in the profits as a remuneration to B for his services.

"A mere participation in the profits will not make the parties partners *inter sese* whatever it will do as to third persons, unless they so intend it."

Haslett v. Harrison, 1 Story, 371; Fed. cases No. 6279, Vol. 11.

"Persons cannot be made to assume relation of partners as between themselves when their purpose is that no partnership shall exist."

There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner

with the others, or without his acquiring an interest in the property itself, so as to effect a change of title.

Insurance Co. v. Draner, 116 U. S. 461, 472.

The case of *Chapline v. Conant*, 3 W. Va. 507, is particularly apposite. In this case it was held that where there was a written agreement between the parties reciting that they were equally interested in option for sale of coal lands, which also gave plaintiff power of attorney from defendant to purchase land and conduct sale thereafter, providing all profits to be distributed equally between them, that it does not constitute them partners. Nothing agreed upon and fixed by terms of agreement except that plaintiff in absence of defendant is vested with power to accept options and make sale of property, and upon so doing profits were to be divided. This does not create partnership but only provides for doing certain things by plaintiff in the absence of defendant, in which one-half of profits go to plaintiff in the event of accomplishment.

When options were about to expire contracts were taken in name of defendant who became responsible for entire purchase price. No liability attached to plaintiff; no sum paid by him; and in no way did plaintiff become liable for payment of any part of purchase price. Property sold year later. Defendant told third parties that plaintiff and defendant were partners at time he fully believed Clark would share in profits.

The Court held:

“If Clark (plaintiff) was a partner with Emory (defendant) why were contracts and options all taken in Emory’s name? Why did Emory advance all the money, and become individually liable to the land owners? These facts are certainly not consistent with the plaintiff’s claim, but speak most strongly against him.”

“To constitute a partnership between parties who share in profits, the interest in profits must be mutual. Each person must have a specific interest in them as a principal trader; he is not a partner merely because he receives a part of the profits as compensation for his services.” (Citing cases.)

“If persons merely occupy the relation of principal and agent, employer or employee or factor, no partnership can be predicated upon the fact that such agent, employee or factor receives a part or share of the profits for his services or other benefits conferred. * * *”

“In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them and also an agreement to share the profits or losses arising therefrom.”

See also *Clark v. Emory*, 58 W. Va. 637-642, 3, 4.

The facts in the case of *Stevens v. M’Kibbin*, 68 Fed. 407, 409-412, are very similar to the facts in the case at bar and the rule announced by the Court in the case cited should control and this Court should hold, as was held in the above case, that the

“testimony wholly fails to establish an agreement and intention of the parties to create the partnership alleged in the bill”

for the reason that

“two of the essential requisites of a partnership are wanting; a joint fund and a common risk
* * *”

Appellee is not entitled to enforce any agreement between appellant and himself for the reason that there has been an entire failure of consideration.

According to the testimony of Dyer, Doan told him that Lucey had agreed that if Dyer would go up to Wichita Falls and organize and run the North Texas Supply Company that Lucey would go in with them on the Louisiana property and that there might possibly be a loss in the Louisiana venture but that the profits that might accrue from the North Texas Supply Company might overcome this loss. Dyer testified:

“With a lump in my throat I said: ‘Well, Larry, if that is a part of the game I will go out and do my best’” (Tr. 299).

Reference is also made to the testimony of Messrs. Doan (Tr. 187-190); Carr (Tr. 275-277), and Doan, Jr. (Tr. 283-286), which clearly indicates the terms of the agreement between Dyer, Lucey and Doan.

Appellee presented his case upon the theory that the claimed partnership relationship continued after the formation of the North Texas Supply Company and Doan became engaged in the Louisiana properties and that by the terms of this agreement

“plaintiff and said defendant * * * and each of them should and would give their attendance and devote their entire time and attention to the business thereof (the partnership) and to the furtherance and advancement of the partnership business * * *” (Complaint paragraph 7, Tr. 3).

In the same paragraph it is alleged

“that said plaintiff and said defendant should from time to time furnish to and for such co-partnership such sums of money as should be necessary to promote and carry on its business and purposes * * *”.

It already appears that Doan did devote his entire time and attention to the Louisiana development and advanced every dollar in these transactions. While it is contended by appellant that the contract between Captain Lucey, Doan and Dyer was as related in the testimony of Messrs. Doan, Couch and Doan, Jr., nevertheless upon appellee's own theory he is not entitled to an interest in any profits yielded from Louisiana operations for the reason that there is a total failure of consideration.

Dyer testified:

“I never invested one cent individually in any of these projects of *Doane's* * * *” (Tr. 126).

It therefore must be conceded that Dyer failed to comply with the terms of the agreement in furnishing any part of the money necessary to promote and carry on the “partnership” business.

Further, the evidence shows that Dyer not only did not devote his "entire time and attention" to the business of the "partnership" but that he devoted practically his entire time and attention to his own projects and in traveling aimlessly about the United States from California to New York. The understanding had between Dyer, Lucey and Doan was to the effect that Dyer should go to Wichita Falls, remain there, manage the business of the North Texas Supply Company, form two rig building companies, drilling company, and devote the remainder of his time to projects in that vicinity (Doan, Tr. 189; Carr, Tr. 277, 280-282; Doan, Jr. 285).

L. E. Doan, Jr., testified that after the North Texas Supply Company was formed he accompanied Mr. Dyer to Wichita Falls, arriving there on June 23rd, but that Dyer did not remain there longer than two weeks. Dyer then went to Fort Worth for a short time and then to California where he remained about a month. Dyer made three separate trips to California before the first of the year and made at least three trips east during that period and that after two weeks Dyer was at Wichita Falls he was not there more than one day a week (Tr. 288).

This testimony is corroborated by the testimony of Mr. A. J. Carr who stated that he called Dyer a great many times long distance and sent telegrams to Dyer addressed to Wichita Falls, and that Dyer was absent and he would meet him at Fort

Worth on a great many occasions. Mr. Carr testified that Dyer was "a pretty live wire when he first started off" but that he slackened up in his efforts to make the business a success some time in the first part of October, 1919 (Tr. 280-81).

Dyer undertook to excuse his trips to California by saying that he went there to buy casing and tool joints. On cross-examination he testified that these articles were not manufactured in California (Tr. 315). It is unnecessary to detail the testimony to prove that Dyer did not fulfill his agreement and remain at Wichita Falls because he testified on cross-examination that all the letters and telegrams which appear in the transcript were received by him at the various points to which they were addressed, California, New York, Chattanooga, Chicago, Pittsburgh and the other points shown. He testified that he remained in California during the month of July for about three weeks, was in Los Angeles on Thanksgiving Day and Christmas and made three trips to New York from June 1st to the end of the year (Tr. 312-13).

During the time the so-called "partnership" was supposed to exist Dyer accepted employment with the American Oil Engineering Company at an initial salary of \$1000 a month, which was subsequently increased to \$1250 a month, and devoted a large portion of his time to the interests of that concern. Dyer testified that he first negotiated with the American Oil Engineering Company in New York the latter part of September or October, 1919, and

that he accepted employment with this concern in November or December of that year (Tr. 125).

He testified further that they paid him \$1000 a month after October or November and that after the first of the year they began paying him \$1250 a month (Tr. 128-9). In addition to this salary Dyer testified that American Oil Engineering Company agreed to give him bonus stock in that company which was being held in escrow at par, and that

“they would carry me for a portion of that stock as one of their family, that the amount would have to be left until a later date, but they would see that I got a good block of it at par” (Tr. 167).

Dyer's testimony to the effect that he explained this transaction to Doan and that it was going to be to their joint interest was denied by Doan, who testified that Dyer told him that he was associated with the American Oil Engineering Company on January 21, 1920 (Tr. 191). Whatever the fact may be it nevertheless appears that Dyer did make arrangements to enter the employment of the American Oil Engineering Company at the salary testified by him and that he was to receive bonus stock in that company as “one of their family”; and it is inconceivable that a firm would pay an employee this large salary and carry him for bonus stock as one of “their family” unless they could command the entire time and attention of their employee. This fact does not match well with the allegations in the complaint that the parties were

to devote their time and attention to the "partnership" affairs, the partnership under the decree having terminated March 22, 1920.

Dyer testified that in the fall of 1919 he went to Fort Worth and established an office for the American Oil Engineering Company, put Mr. Spoons in charge as their representative, and that he was instrumental in having Mr. Spoons go there and helped to open the office, and he further stated that "I oversaw it" (Tr. 165). He further testified that he had something to do with the work of drilling a well for the American Oil Engineering Company in the fall of 1919. Dyer evidently became a trusted employee of the American Oil Engineering Company at the time the arrangement was made with that firm because, according to his own testimony, he had established an office for them and was overseeing their business at Fort Worth, made trips to New York himself for them, superintended the work of drilling their well at Wichita Falls (Tr. 166), and that he purchased a pipe line for the American Oil Engineering Company; and it is interesting to note in this particular that while Dyer was manager of the North Texas Supply Company he turned the profit which would accrue to that corporation over to the American Oil Engineering Company.

The American Oil Engineering Company evidently had furnished Dyer with their stationery because the letter addressed by Dyer to Doan from Fort Worth, January 21, 1920, was written on the

stationery of the American Oil Engineering Company (Defendant's Exhibit "C", Tr. 195), and he again used this stationery in writing to Doan under date of January 26 (Defendant's Exhibit "E", Tr. 197) and again under date of February 9, 1920, Dyer wrote to Doan on the stationery of the American Oil Engineering Company and stated:

*"I have just completed the purchase of a dandy lease in Stephens County for my New York friends * * *" (Defendant's Exhibit "F", Tr. 198-9).*

This was all prior to the time the so-called partnership had been terminated, the date fixed by the Court being March 22, 1920.

Dyer testified that in November, 1919, he told Captain Lucey that he had made arrangements to do some work for the American Oil Engineering Company and wanted to know how soon Captain Lucey was going to take over the North Texas Supply Company because after the first of the year he could not give them very much of his time (Tr. 301.) There has never been a claim advanced by Dyer that the services which he was to render to the American Oil Engineering Company were within the scope of any partnership agreement and this and other testimony relating to the American Oil Engineering Company is conclusive upon the fact that no partnership existed and that Dyer without the consent of Doan, even without his knowledge, negotiated with this concern to enter their employ on his

own account and in furtherance of his own independent interests.

Dyer's last version of his negotiations and relations with the American Oil Engineering Company are set forth in his testimony appearing at Tr. 314:

"The first talk I had with reference to my entering the employ of the American Oil Company was about the first of October. I went to New York and met Mr. Seton, Mr. Porter and Mr. Meredith. We reached no conclusion at that time. I first agreed with them to render services in the latter part of the year. I think it was in November that I encouraged them and settled it in December, when I went there for a meeting. The January check I received was for December services. At our first meeting they spoke of bonus stock. I was to be given that after it had been earned. I got it at par and it was held in escrow."

In the light of this testimony it cannot justly be held that the appellee fulfilled the agreement he had made with Messrs. Lucey and Doan, nor that he measured up to the agreement which he swore in his complaint the parties had made, that they should devote their entire time and attention to the business of the "partnership" affairs. The testimony of appellee himself shows that he absented himself from the place where he should have been engaged and made several trips to California and New York on his own personal account, and made a separate and independent arrangement to enter the employment of the American Oil Engineering Company, established offices for them at Fort Worth, undertook to oversee their busi-

ness, made several trips to purchase a long pipe line for them and superintended the construction of their drilling operations as "one of their family". All during the time it appears from the uncontradicted evidence Doan was devoting his entire time and attention to his Louisiana venture. The fact that Doan, according to the testimony of Mr. Titus and himself (Tr. 203, 187) refused to permit Dyer to go to Louisiana and participate in the control, management or development of the properties which Doan, Titus and Lucey had acquired cannot excuse Dyer for not having carried out the agreement to conduct the business of the North Texas Supply Company and earn the bonus stock which had been promised him by Captain Lucey provided a profit of \$100,000 had been made at the end of 12 months, especially in view of the testimony of Mr. Carr that the trade and business conditions and the supply business during the year 1919 at Wichita Falls were the best of any district he had ever known; the rig-building business was excellent; in fact all oil well business was excellent

If there had been a partnership Dyer would have had a vested interest in the partnership business but it cannot be held under the evidence that he had such an interest, nor can it be shown as far as the Louisiana operations were concerned that it was a joint venture. Under no possible theory can Dyer claim that he had more than a contingent interest in Doan's Louisiana activities dependent upon his success in managing the North Texas Supply Company and the kindred operations at

Wichita Falls. Even though the parties had been engaged in the joint venture Dyer would not be entitled to recover because he did not fulfill his provisions of the agreement but failed entirely to carry out the provisions of any agreement which may have been entered into between the parties by his failure to properly manage the business of the North Texas Supply Company, form the subsidiary companies and by accepting employment with the American Oil Engineering Company. There was an entire failure of consideration. It conclusively appears from the account rendered by Dyer (Tr. 384) that Doan did not profit to the extent of a single dollar in any of Dyer's activities during the time Doan was engaged in developing the Louisiana holdings, and it must be held that his claim is unfounded.

It is respectfully submitted that the Court should hold, as it was held in the case of *Mitchell v. Oneal*, 4 Nev. 926, that

“upon the showing thus made by plaintiff himself the contract or agreement was entirely without mutuality, founded upon no consideration, and hence entirely void”.

It is submitted that the interlocutory decree should be set aside and that this Court should direct that a final decree be entered declaring that no partnership existed between the parties at any time; that there was a total failure of consideration supporting on behalf of appellee any agreement or agreements which he at any time made with appellant; and that appellee is not entitled to an

accounting or to receive any sum whatever from appellant.

To affirm the interlocutory decree would establish a precedent which would make it unsafe for any person to maintain the most casual business relations with others, in which such others had a contingent interest, without fear that the parties having such contingent interest might, in the event the venture proved a success, claim the rights accruing to a partner and, in the event of failure, disclaiming any such relationship.

ACCOUNTING.

In the event this Court concludes that the interlocutory decree entered in the trial Court should be reversed, it will, of course, be unnecessary for the Court to consider the questions relating to accounting.

In arguing the assignment of errors relating to the accounting between the parties we will, of course, proceed upon the assumption that the parties to the controversy were partners without in any way conceding the correctness of the interlocutory decree establishing this relationship.

By stipulation between the parties all evidence introduced before the Court in the main case was incorporated in the record of the proceedings before the Master.

Appellant's argument relating to the accounting between the parties will deal only with Exceptions Nos. 26 to 34, inclusive (Tr. 416-424) which concern the right of the appellee to any portion of the second issue of stock of the Doan Oil Company which Doan in his discretion did not purchase.

In this particular the Master concluded that none of this stock constituted an asset of the partnership, the Court, however, disapproving this portion of the Master's report.

The argument will also relate to Exception No. 39 (Tr. 426-7) in which it is contended that the Court erred in overruling defendant's exceptions to the Special Master's report in refusing to allow defendant interest upon all moneys advanced by him as set forth in defendant's amended account.

APPELLEE HAD NO INTEREST IN THE SECOND ISSUE OF THE STOCK OF THE DOAN OIL COMPANY AND APPELLANT IS NOT OBLIGED TO ACCOUNT THEREFOR.

The facts relating to the authorization, apportionment, issuance and sale of this stock are undisputed and are set forth clearly in the report of the Master (Tr. 34-39).

The manner in which this stock which had been allotted to Doan was sold and disposed of is set forth in the testimony of Doan (Tr. 348, 349, 350, 354, 355, 356, 358, 359); and the testimony of Mr. Claude Gatch (Tr. 361, 364); Mr. W. B. Morris (Tr. 365,

366, 367); Mr. C. E. Doan (Tr. 376-380); and Mr. L. E. Doan, Jr., (Tr. 381-383).

At the time the Doan Oil Company was organized stock of a par value of \$300,000 was issued, of which Doan acquired one-third, and for which he paid \$100,000 from his own funds. By a resolution adopted by the Board of Directors of Doan Oil Company on November 10, 1919, the company offered 100,000 additional shares of its capital stock for sale at par, payable one-half on or before December 15, 1919, and one-half on or before January, 1920 (Tr. 34). Stock was offered to the stockholders as follows:

- 50,000 shares to Louis Titus;
- 33,333 shares to L. E. Doan; and
- 16,667 shares to Captain J. F. Lucey,

the stock being apportioned in ratio to the interests of the stockholders in the corporation. The resolution provided that if the stockholders named failed to subscribe and pay for all or any portion of their allowance, the stock should be subjected to such further action as the board might decide.

Appellee claims that he *individually* should have been accorded the right to acquire one-half of the amount of stock allotted to appellant.

It is contended by appellant that the claim of the appellee should be disallowed for the reasons:

That the right to acquire this stock was a partnership asset and that appellee had no individual right thereto;

That appellant as an active "partner", in exclusive control and management of the "partnership" business, had a right to exercise his discretion in not acquiring this stock.

That there were no partnership funds with which to acquire this stock and there was no obligation upon appellant to advance funds to acquire all or a portion of this stock;

That appellant had no funds of his own with which to acquire this stock;

That appellee had no funds of his own with which to acquire this stock for himself individually or for the partnership;

That appellee had no right to individually subscribe for this stock;

That appellee could not have profited by the acquisition of this stock for the reason that he would have been obliged to surrender one-fourth of it in order to obtain the money to pay for the stock;

That the portion of this stock issued to Messrs. Gatch and Morris was in satisfaction of a partnership obligation and that therefore neither the partnership nor the parties individually could have acquired this portion of the stock;

That the transaction relating to the issuance of a portion of this stock to Doan's son was consummated subsequent to the termination of the "partnership";

That title to the stock passed absolutely to the persons acquiring it and that they paid for it with their own funds.

If in fact the parties bore the relationship of partners, as was found by the interlocutory decree, at the time this second issue of stock was offered it follows as a matter of law that the option could only be exercised by the partnership for and on behalf of the partnership and not for the benefit of either of the partners individually. Either one of the parties, in this case the active managing partner, could, as was held by the Master, exercise a discretion binding upon the partnership to take advantage of the offer to acquire additional stock, or on behalf of the partnership to nominate others as provided by the resolution of the Board of Directors of Doan Oil Company.

The fact that Doan, who was in exclusive charge of the business, who had advanced *all* of the capital, who had done *all* of the work, exercised a discretion in not acquiring this stock for the partnership does not entitle appellee to recover one-half of the amount of stock for which appellant might have subscribed.

It was found by the Master that

“in any event it must be remembered that the terms of the partnership implied a discretion in Doan as to how much of his money he should invest. He certainly could not be compelled to borrow or even invest funds of his own if he did not deem it wise” (Tr. 36).

This finding of the Master is fully supported by the evidence of appellee and his witnesses to the effect that Doan “was to take care of the Louisiana end and Dyer was to take care of the Texas end”.

Doan testified that he would not permit Dyer to go to Louisiana, this testimony being corroborated by Mr. Louis Titus, and there is not a syllable of testimony to the effect that Dyer ever undertook to exercise any judgment with reference to the acquisition and development or sale of any of the Louisiana properties, nor is there any evidence to show that he protested against Doan's refusal to permit him to go to Louisiana; in fact he testified that the only information he had about Louisiana was such as had been given him by Doan (Tr. 122-3).

Doan's testimony to the effect that he did not have any money with which to purchase any additional stock stands uncontradicted in the evidence and there being no testimony to the effect that Dyer ever claimed any right to participate in the management of the Louisiana properties, it must be held, as was found by the Master, that Doan could exercise a discretion on behalf of the "partnership" in not acquiring this stock.

If the parties were in fact "partners" either one of the "partners", and especially the "partner" who had advanced the entire capital of \$100,000 out of his own funds, and who without any protest or objection from his "partner" had the exclusive charge and management of the "partnership" business could exercise a discretion on behalf of the "partnership" of subscribing and paying or declining to subscribe and pay for the "partnership" allotment, and in the event there were no partner-

ship funds,—and this is the fact because there never were any with which to acquire this stock,—had a right to bind the partnership by nominating the persons who might avail themselves of this right.

Doan testified that there was no existing account of Doan & Dyer or Dyer & Doan at the time the second issue of stock was made in November, 1919, and never was any such account; that he did not have any funds belonging to Dyer at that time, but on the contrary Dyer owed him money which Doan was endeavoring to obtain from Dyer. It was about this time, according to the testimony of Doan, that he requested Dyer to repay him \$6000 on account of the Doan Syndicate. Dyer agreed to pay this money but paid only \$3000 of it to Doan. Dyer also held the money that had accrued under the last sale of the Oklahoma lease.

There is no evidence to show that Doan ever agreed to purchase any particular properties or any specified amount of stock in Doan Oil Company or any other concern. Dyer had no money of his own and his testimony was to the effect that his borrowing capacity was limited to \$50,000. Doan testified that he had borrowed some of the money which was invested in Doan Oil Company. He could not be compelled against his will and was under no duty to borrow further additional sums to invest for the benefit of a then "silent partner".

Dyer had much to say in his testimony with reference to his ability to purchase some of this addi-

tional stock but there is not one syllable of evidence to the effect that he ever made an offer to advance any sum to Doan to supply any capital for the partnership.

By reviewing the testimony of Dyer it will be found that it relates exclusively to an alleged offer made to *Doan* to pay *Doan* \$50,000 for one-half of the stock of Doan Oil Company which Doan held in his name, according to the theory of plaintiff's case, under an agreement of partnership. If Dyer had this money to invest it was his duty, if the claimed relation existed, to advance this \$50,000 as capital to be used by the partnership. In Dyer's amended verified complaint it is alleged that both Doan and himself should from time to time furnish to and for the partnership such sums of money as should be necessary to promote and carry on its business. His interest in the partnership would then have been equalized. But, according to his testimony, he was purchasing the stock for his own personal account either from Doan Oil Company or from Doan. In his letter of January 21, 1920, addressed to Doan, Dyer advised that in order to raise the \$50,000 which he desired to pay Doan for one-half of the stock held by Doan, and in order that title to this stock might vest in Dyer, he would be obliged to give one-fourth of it to Mr. Herbert Fleishhacker with whom he claims to have made an arrangement to borrow this \$50,000, although Mr. Fleishhacker has no recollection of having committed himself in this particular.

The sum and substance of plaintiff's testimony relating to this transaction is that he was giving up one-fourth of 50% of the stock of the Doan Oil Company standing in the name of Doan in order to acquire a three-eighths undivided interest *for himself*. It cannot be held that the offer was made either on behalf of the partnership or that Dyer was offering to do this in order to equalize the partnership interests. The evidence shows conclusively throughout the transaction Dyer was dealing with Doan individually as the owner of the stock and did not intend in any sense that the amount of \$50,000 should be applied to the capital account of the partnership.

In view of appellee's own testimony, especially when read in the light of surrounding circumstances,—giving consideration also to the fact that plaintiff was unable to obtain the \$10,000 necessary to fulfill the agreement admitted by him to pay for and acquire the stock of the North Texas Supply Company of this value, it must be held that in the first instance Doan was under no obligation to acquire any portion of this additional stock for Dyer and incidentally for the partnership; that Dyer was wholly unable to acquire any of the stock even though he had been invited to do so; that the plaintiff has never been at any time entitled to any portion of this stock; and that defendant could not be held accountable therefor.

The testimony of Dyer and his witnesses is also conclusive upon the fact found by the Master that

“In any event, it is not evident from the evidence that Dyer would or could have subscribed to this extra stock and so he is not proved to have been harmed by Doan’s nondisclosure. He apparently had no considerable funds of his own and his credit is limited by the proofs to \$50,000.00. It is therefore not apparent that Dyer could have taken the extra 16,666 shares any easier than Doan could have done so” (Tr. 35).

The testimony of Dyer is to the effect that he was desirous of acquiring one-half of the allotment which had been made to Doan. Dyer would have been obliged, according to his testimony, even though he could have arranged for a loan of the necessary amount to pay for this stock, to give up a quarter of it as he was obliged to do in borrowing the \$50,000 which he expected to pay to Doan *individually* for 50% interest in the stock originally issued to Doan, and would not therefore have profited by the transaction. Dyer testified that he had no money with which to purchase any stock whatsoever. He testified in the proceedings before the Master that he did not purchase the stock for which he had subscribed in the North Texas Supply Company because he could not do so, and that he subsequently got Messrs. Couch and Owens, friends of his, to purchase this stock for him (Tr. 386). Dyer further testified that he asked to purchase one-half of “his (Doan’s) holdings” and that he was going to borrow the money to purchase and was to give Mr. Herbert Fleishhacker one-quarter of the \$50,000 of stock if he had to get it (Tr. 387-8).

The salary which Dyer had received from the North Texas Supply Company and the American Oil Engineering Company was, according to the testimony of Dyer, "dissipated" by him (Tr. 390). If the allegation contained in Dyer's complaint to the effect that the parties were to "furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business" (Complaint paragraph 7, Tr. 3) it was his duty, if he had the \$50,000 available or any other sum, to invest this in the partnership in order that the interests of Doan and himself might be equalized. However, he at no time made an offer to pay this or any other sum into any partnership fund but all his testimony relates to an effort he made to pay Doan \$50,000 for *his* interest in the Doan Oil Company. He was desirous of acquiring this stock for his own personal account. Throughout Dyer's testimony he has contended consistently that he was entitled to acquire an individual interest in the stock of the Doan Oil Company. His counsel has presented his case upon this theory and it is respectfully submitted that the erroneous assumption made by appellee, his counsel, and the Court, that Dyer was individually entitled to subscribe to any portion of the allotment made to Doan individually or to the partnership, can not be supported by the facts or the law.

The undisputed testimony shows, as far as Doan is concerned, that he did not have any money to pay for additional stock and that of the amount

of stock allotted to him 5000 shares were issued to Morris, 5000 shares were issued to his brother, 5000 to his sisters, 5000 to his nephew, and a portion of his allotment, together with some of the stock which had been allotted to Lucey and Titus, amounting in all to 10,000 shares, was issued to S. S. Raymond, geologist in the employ of the Doan Oil Company (Tr. 340, 348). The evidence of Doan is supported by vouchers which he introduced in evidence, also by the testimony of his brother (Tr. 376-380) and Messrs. Morris & Gatch (Tr. 361-368), and proves conclusively that the stock issued to R. E. Doan, Hattie E. Doan, Mary Elizabeth Doan, C. E. Doan, S. S. Raymond, and to Messrs. Gatch & Morris, was paid for by moneys advanced by these parties, at par, and that Doan did not advance any of the money for any of the stock and had no understanding from any of the parties named that he was to receive any of this stock and that the stock was bought and paid for by the parties to whom it was issued.

The Master found that

“the evidence is very plain that each of these persons (to whom Doan’s allotment of stock was issued) paid for the stock with his or her own money and that there was and is no agreement for resale to Doan” (Tr. 37).

It is respectfully submitted that the trial Court erred in sustaining plaintiff’s second exception and in overruling this part of the Master’s report; and that the Court fell into error, as appears from

memorandum opinion (Tr. 66, et seq.), in holding that Dyer had an *individual* right to subscribe for this stock, when as a matter of fact if the parties were partners the partnership could alone exercise this right.

It is therefore respectfully submitted that appellant's exceptions should be allowed and the final decree modified to conform to the findings and report of the Master.

In the Master's report, page 41, et seq., there is set forth the transaction between Doan Oil Company, L. E. Doan and Louis Titus and the General Petroleum Company, whereby the Doan Oil Company gave the General Petroleum Company an option to purchase certain properties, consideration for the option being \$50,000 paid to Doan and Titus and the issuance to them of stock of the General Petroleum Company of an agreed value of \$200,000. The money and stock received as consideration for the option was applied proportionately to the interests of the stockholders at that time, including those who had acquired the original issue and second issue of the stock of the Doan Oil Company.

In this connection we direct the Court's attention to the fact that while appellee contends that appellant prejudiced his interests and mismanaged the affairs of the partnership, and generally wronged appellee in not subscribing for the second issue of stock of Doan Oil Company, that when appellant exercised his discretion in extending an option to the General Petroleum Company for the entire

stock standing in appellant's name, of a par value of \$100,000, and which resulted in a profit, that no such question of authority or abuse of discretion was raised.

In the Master's report he held that the second issue of \$100,000 of the Doan Oil Company, of which 33,333 shares were apportioned to Doan, was not an asset of the partnership and that Doan need not account to Dyer for this amount. The Master further held that Doan should account to Dyer for one-half of the \$12,500 and one-half of the 248 shares of the General Petroleum Company stock which accrued to Doan under his proportional interest in the Doan Oil Company at the time this money and stock was apportioned among the stockholders (Tr. 46).

The finding of the Master with respect to the 33,333 shares was reversed and it was held by the Court that this stock became a partnership asset. The decree further provides (Tr. 75) that plaintiff is entitled to his pro rata thereof, to wit, one-sixth, represented by \$8333.33 and $166\frac{2}{3}$ shares of the General Petroleum Company, and that plaintiff is entitled to credit for all dividends paid by General Petroleum Company since April 16, 1920.

In the event this Court sustains the Master's findings and conclusions and reverses the decree entered by the trial Court relative to the 33,333 shares of stock of the Doan Oil Company Dyer would only be entitled to receive one-half of the \$12,500 received by Doan, together with interest;

one-half of the proceeds of the sale of 2 shares made by Doan to Titus, with interest; and one-half of the 248 shares of the General Petroleum Company held by Doan, as found by the Master, instead of the amount of money and stock awarded to Dyer by the decree of the Court.

Appellant is entitled to interest upon the moneys advanced by him on behalf of appellee from the date of advancement to date.

In the amended account submitted by Doan in response to the requirements of the interlocutory decree an interest charge is made on moneys advanced by Doan, aggregating \$9149.30 (Tr. 328, et seq.), the interest being computed for a term represented by the time the moneys were paid by Doan until the date of the account. By this account it is shown that Dyer owed Doan the sum of \$33,345.72 (Tr. 330, et seq.).

The account submitted by Dyer shows that the balance claimed by Dyer on the moneys handled by him from the entire "partnership" from August, 1918, until the date of dissolution decreed by the Court is \$602.32 (Tr. 384-5).

At the hearing before the Master appellee's counsel did not question the allowance of interest but contended that a proper method of computing this interest would be to compute it by determining from day to day during the acquisition of the Doan Oil Company stock the balance of Doan's own money shown to have been invested therein (Master's report, Tr. 48).

The Master, however, held that in the absence of an agreement interest should not be charged on the advances of partners to firm capital or on the balance to a partner's credit and finding that there was no such agreement held that Dyer should only be obliged to pay to Doan interest due Doan from Dyer from the date of the dissolution, aggregating \$5471.80 (Master's report, Tr. 5-55). Doan, however, is charged with interest on one-half of the dividends accruing on Doan Oil Company stock and interest on one-half of the cash received from the General Petroleum Corporation; interest on one-half of the amount which Dyer advanced in purchasing an automobile, aggregating \$130.11; and interest on one-half of the amount advanced by Dyer to Couch on the previous deals (Tr. 54). Appellant is unable to understand why he should be required to pay Dyer interest on the comparatively small sums advanced by Dyer on the Texas deals and be denied the right to recover interest from Dyer for amounts which Doan advanced on the Louisiana deals. There can be no difference in principle.

The Master fortifies his ruling by the citation of several authorities which it is respectfully submitted are not controlling, under the facts in the case at bar. It is true as found by the Master, that there was no express agreement between the parties to pay interest on advances made by either of them to the partnership. In fact it is appellant's contention that there was no agreement at

all. It is alleged in plaintiff's verified amended complaint that

"said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business" (Paragraph 7, Tr. 3).

The amended complaint was filed on the last day of the hearing after the evidence had been closed and at a time when both appellee and his counsel were fully advised as to the facts and appellee cannot now contend that there was any other agreement between the parties.

The uncontradicted evidence shows that Doan advanced every dollar that was invested in the Louisiana properties both prior and subsequent to the organization of the Doan Oil Company. Dyer testified:

"I never invested one cent individually in one of these projects of Doan's" (Tr. 126).

Dyer's account also shows this to be the fact (Tr. 384).

There is no evidence to the effect that Doan was to provide the entire capital for the partnership and in the absence of any such evidence the allegations contained in plaintiff's complaint must be accepted.

The general rule announced by the Master to the effect that in the absence of an agreement interest should be charged on advances made by the

partner to the *firm capital*, or on balance to a partner's credit no such interest will be allowed, may be conceded. But the facts of this case take it out of the general rule and therefore the authorities cited by the Master are not controlling.

In the case of *Tirrell v. Jones*, 39 Cal. 655, the agreement was that one of the parties should advance all the necessary funds in the execution of the venture and the other party should render his services, skill and experience, for which they respectively were to receive an equal division of the profits. In the case at bar the facts, according to the allegations contained in the complaint, are that the parties "should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business".

The evidence further shows that not only did Dyer fail to contribute any sum whatsoever to the "copartnership" but that during the time Doan was engaged in the Louisiana activities Dyer withheld \$2090 (the same item set forth in his account), which he stated he was withholding "subject to our settlement" (Tr. 164). In the case under analysis it was expressly provided that one of the parties should advance all of the necessary funds and the other should render services, skill and experience. The uncontradicted evidence in the case at bar shows that not only did Dyer fail to furnish any sums to the copartnership but that

he never participated in any way in the Louisiana activities. Dyer testified:

“I never invested any money in Louisiana in any property in which Doan was interested, except through Doan. I never invested one cent individually in any of these projects of Doan’s” (Tr. 126).

The next case cited by the Master, *Falkner v. Hendy*, 80 Cal. 636; 103 Cal. 26, likewise related to a partnership in which the defendant was to furnish the entire capital and plaintiff his experience and time, and there was an express agreement that the defendant should be entitled to interest of $1\frac{1}{2}$ per cent per month upon all of the advances made by him on account of the joint enterprise. The Court merely held in deciding this case that upon the termination of contractual arrangements the legal rate of interest was chargeable against plaintiff and not the rate of interest which was provided for by the agreement to be paid during the continuance of the relationship.

In the case of *Carpenter v. Hathaway*, 87 Cal. 434, also cited by the Master, the agreement contemplated that one of the partners should furnish the entire capital and the other render services in furtherance of the joint venture and it was held that the partner furnishing the capital was not entitled to interest thereon. The case is essentially different from the case at bar in which, according to the sworn complaint of the plaintiff, the parties were both to devote their entire time to the business of the partnership and furnish such moneys

to the partnership as were necessary to conduct the business.

Young v. Canfield, 33 Cal. App. 343, was likewise a case where one of the partners was to furnish the capital and the other all the work in connection with the venture. It was held that the person furnishing the capital could not recover interest unless there was an express agreement to that effect.

In the case at bar the \$100,000 subscribed by Doan to the stock of the Doan Oil Company was not a contribution to firm capital but \$50,000 of this amount was in the nature of a personal loan to Dyer. By referring to Defendant's Exhibits "C" and "E" it is impossible to escape the conclusion that Dyer so regarded the transaction. He was, as already pointed out, offering to repay to Doan \$50,000 for a one-half interest in the Doan Oil Company stock. He was not offering to pay this amount into the treasury of the partnership but he was offering to pay this money to Doan individually, thereby recognizing that he was obligated personally to Doan for the \$50,000 which represented one-half of the amount advanced by Doan to purchase the stock of the Doan Oil Company.

Appellant's demand that appellee pay interest on this \$50,000 is not an attempt to charge the firm with this payment but is a request to have this amount accruing by way of interest applied as an addition to what is due from Doan to Dyer. It

is in the nature of interest on a personal debt from Dyer to Doan.

As far as the transaction relating to the Doan Oil Company stock was concerned the "partnership" under the decision of the Court had invested \$100,000, representing the entire partnership capital. Plaintiff has sworn that the agreement between the parties required that they should furnish to the partnership from time to time such "sums of money as should be necessary to promote and carry on its business". It is not disputed that this money was necessary to carry on its business. The interests of the parties under the decision of the Court were equal and if this be so each should have contributed to the partnership capital an equal amount, or \$50,000 each. Under the decree of the Court it must be held that Doan actually paid this amount into the Doan Oil Company from the funds of the "partnership". Dyer became obligated to Doan personally for 50% of this amount. The partnership as such was not interested in the relations between the parties themselves. This \$50,000 was not a debt from Dyer to the partnership but was a debt from Dyer to Doan. And this is true as shown by Defendant's Exhibits "C" and "E".

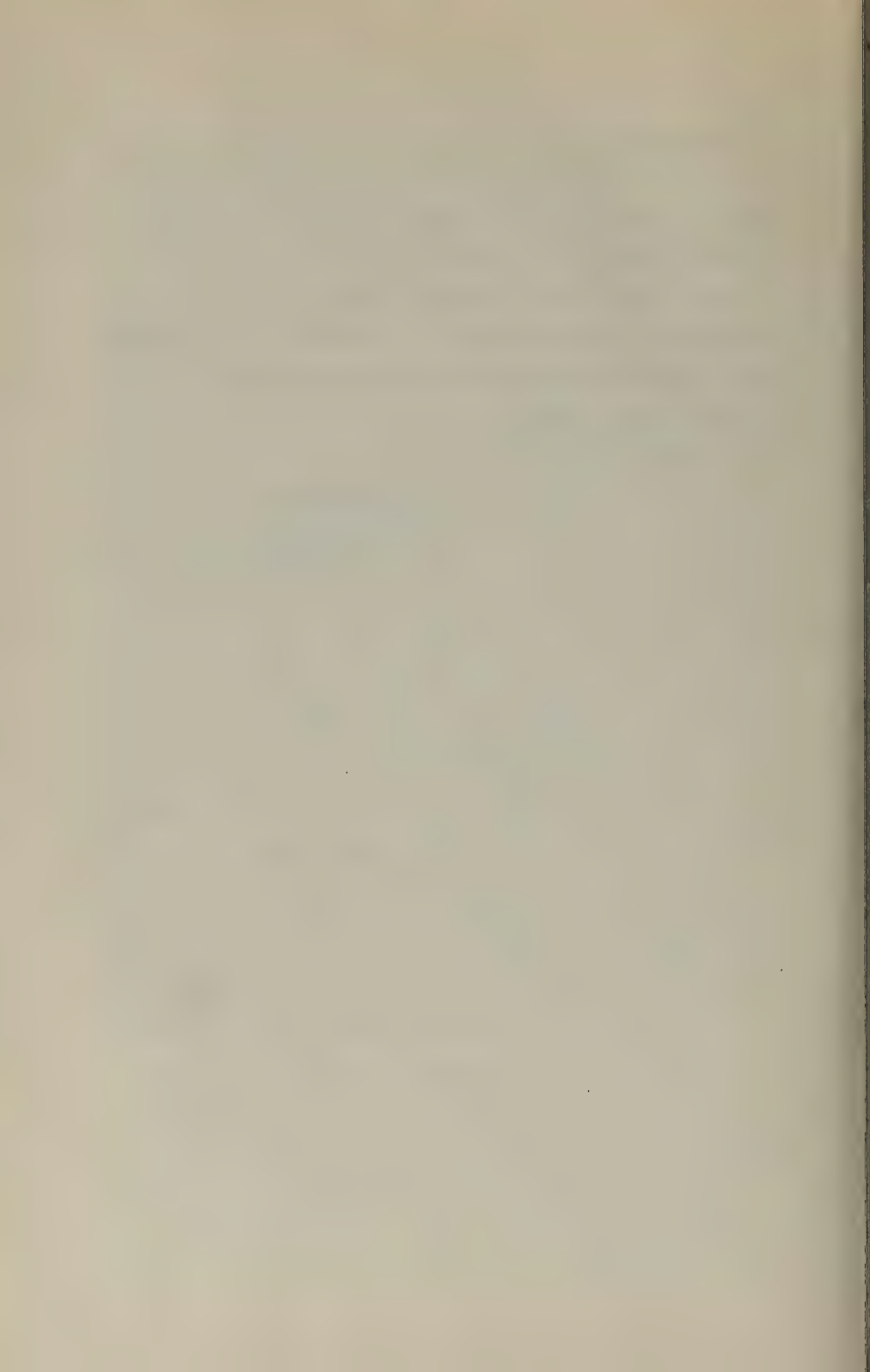
This is an equitable proceeding and it would do violence to the equitable principles which govern in such cases for this Court to affirm a decree which denies one who has advanced the entire capital; assumed the entire risk; and devoted his entire time, in an undertaking in which the other has never

contributed a cent; assumed no risk; and devoted no attention, the right to recover interest accruing upon one-half of the amount advanced, according to the decree, for the other party.

It is respectfully submitted that the interlocutory and final decree should be reversed and suitable order entered dismissing the proceedings.

Dated, San Francisco,
October 9, 1922.

C. W. DURBROW,
JOHN BREUNER, JR.,
Attorneys for Appellant.



No. 3915

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT. 3

L. E. DOAN,

Appellant,

vs.

B. T. DYER,

Appellee.

BRIEF FOR APPELLEE

W. H. METSON,

R. G. HUDSON,

Attorneys for Appellee.

FILED

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F. D. MONTGOMERY



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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

L. E. DOAN,

vs.

B. T. DYER,

Appellant, }
 } No. 3915
Appellee. }

BRIEF FOR APPELLEE

NO PARTNERSHIP

1. Appellant states in his brief that there is no evidence to sustain the findings that there was a partnership between the complainant and the defendant.

This agreement of partnership was made in the State of California, and the laws of the State of California become a part of the agreement. C. C. P., Sec. 1646.

Among the reasons stated by counsel that there was no partnership are the following:

There was no firm name; no joint bank account, nor

common fund, no common books of account; none of the commissions that Dyer received were ever placed in any joint account; they had no letterheads with the names of Dyer & Doan upon them; that business was transacted in the individual names of the parties; that Doan advanced all the money; that Doan had full sway in the business; that Dyer was an agent; that each transaction was separate and independent; that Doan assumed all the risk and paid all the losses; that the partnership funds were not accumulated; that Dyer had independent dealings with one Leland; that Dyer did not account for commissions received from Jergins. (See Tr., 312.) Not true.

Counsel then states that after Doan became interested in Louisiana there was a marked change in the relationship of the parties.

Another objection that counsel has to the decree is stated by them in the following language:

“It is respectfully submitted that the interlocutory decree runs counter to the well-established rule that a partnership can never be created by implication or operation of law apart from the express or implied intention and an agreement to constitute the relation” (Appellant’s Brief, page 17).

At page 25 counsel states:

“The several letters addressed by the parties to one another during the time that Doan was engaged in developing the Louisiana properties .

. . . conclusively show that the parties were not partners but that on the other hand they were each engaged in independent ventures."

2. WHAT IS A PARTNERSHIP.

Section 2395 of the C. C. of California defines a partnership as:

"An association of two or more persons for the purpose of carrying on business together, and dividing the profits between them."

Kent defines a partnership as follows:

"A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions."

According to these definitions all that the parties need to do to constitute themselves partners is associate themselves together, do business and agree to divide the profits; the law does the rest.

There is no requirement that business be done under a firm name, there is no requirement that there be a common fund or joint account and counsel cites no authority to sustain these propositions.

In *Westcott vs. Gilman*, 170 Cal. 562, the Edmund Peycke Co. wrote a letter to Gilman agreeing to sell oranges and lemons on their joint account, Gilman to

do the buying, to pay for the packing house, the fruit to be secured upon consignment if possible, otherwise the Company to furnish the money. Gilman to receive \$5.00 for each car shipped, and packing house expenses to be charged against the joint account. Profits and losses to be divided equally. The Court held this to be a partnership. At page 567 the Court said:

“Appellant next asserts that there is no mutuality of agency in the contract and relationship of these parties and that such mutuality of agency is essential to the partnership . . . But the facts that Gilman was the fruit buyer for the joint venture and that the Peycke Company reserved the right to veto prospective purchases if the price was not satisfactory to it . . . are far from being determinative of the question. In this aspect the case is as that presented in *Clark vs. Gridley*, 49 Cal. 105. This court had no difficulty in declaring a partnership to exist where one of the parties to it was to buy wool in Marysville and ship the wool to the co-partners in San Francisco, drawing drafts upon them for the payment of the wool, the profits and losses to be shared equally. . . .”

Page 568.

“The non-existence of a partnership in this case, it is further declared, rests upon the fact that there was ‘no community of interest in procuring the fruit.’ This can only mean that because Gilman was to devote his services to the work of procuring it, precisely as the Peycke Company was to devote its services to the handling and sale of it, each without charge, no partnership

existed. But so untenable is this position that it needs only the statement for its refutation. . . .”

Page 569.

“Of course a partnership may be organized for the prosecution of one or two adventures, as well as for the conduct of a general and continuous business. It is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership If by contract or by conduct or by both they have in point of law engaged in a partnership venture, so far as third persons are concerned, they cannot be heard to deny the relationship and the liabilities arising therefrom. It is plain from the very terms of the agreement between these defendants that it measures up to the definition of a partnership as declared by Section 2395 of the Civil Code.”

According to this decision it was immaterial that Mr. Doan furnished the money and took the titles in his own name, or that he directed the operations or that Mr. Doan did one part of the work and Mr. Dyer did another part of the work. Nor did it destroy the partnership because the conduct of the business was not continuous but consisted of separate acts. Nor is it the law that a partnership can be created only by consent of the parties, for as this case shows the relation of partnership may be imposed upon parties against their desire and their wish, and contrary to their intent.

In *Chapman vs. Hughes*, 104 Cal. 302, at page 304, the Court said:

"The syndicate agreement did, in our judgment, constitute a partnership within the definition of Section 2395 of the Civil Code. It created an association of three persons for the purpose of carrying on together the business of selling lands, and dividing the profits of that business between them. It contemplated united action in advertising and otherwise in promoting sales, and a joint expense to be incurred thereby, and further expressly provided for the payment *to the syndicate* of commissions on sales of other lands than those put into the syndicate.

This was sufficient to constitute the relation of partnership. Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established, although the parties may not expressly intend to create such relationship . . .

The respective parcels of land embraced in the syndicate were contributed by the respective partners, and thereby became subject to the general agreement. (Civ. Code, Secs. 2401-03.) This was not affected by the agreement that each partner should retain *his title*; they held the legal title in trust for the partnership use."

In the case at bar Mr. Doan held the legal title to all of these lands and also to the stock in the Doan Oil Company in trust for the partnership, Doan & Dyer.

In *Krasky vs. Wollpert*, 134 Cal. 338, Charles Wollpert and H. A. Krasky formed a partnership

and it was agreed that the business should be carried on under the name of H. A. Krasky. At page 341, the Court said:

“That defendant Wollpert allowed the business to be run under the name of his co-defendant; that he paid similar bills; that he paid one hundred dollars on this note . . . are all circumstances corroborating the testimony of Krasky that a partnership existed between defendants.”

In *Lanpher vs. Warshauer*, 28 Cal. App. 457, at page 459, the Court said:

“The Court expressly finds that the parties to the action did agree upon the subject of engaging in a certain building venture, wherein the skill and labor of one was to be combined with the capital of the other, and that the profits and losses of the business were to be equally shared. Such an agreement satisfies the code definition of a partnership.”

Later in this Brief it will be shown that Dyer supplied skill, time, opportunities and large sums of money.

Measured by these authorities, a partnership must have existed between Mr. Doan and Mr. Dyer.

3. *Was the Doan Oil Company an asset.*

There are two phases to this question, first was the company originally an asset, and second was it lost to the company by reason of a forfeiture for failure of

Mr. Dyer to pay up his portion of the capital stock. The first phase will be here considered.

Messrs. Dyer and Doan occupied offices in the City of San Francisco in the Balboa Building.

On the 29th day of March, 1918, J. F. Lucey, one of the incorporators of the Doan Oil Company, sent the following telegram to B. T. Dyer, the complainant herein, from Houston, Texas:

"It is the consensus of opinion that Ranger fields lying between Ft. Worth, Brownwood, Coleman, offer possibilities as great as Oklahoma . . . Believe that you and Doan could make great success but question the advisability of you coming alone. It requires two. You and Doan have the necessary combination of ideas and energy to make good . . ." (Tr. p. 106).

Soon after receiving this telegram Mr. Dyer went to the Texas oil fields.

The partnership about which this litigation arose had its inception in the long-time friendship between Doan and Dyer.

They met at various places in the oil fields in 1907. They later had offices together. They dealt together. This particular partnership originated with the telegram received by Dyer from Lucey on March 29, 1918, which Dyer showed to Doan and about which they talked.

In that telegram from Houston, Texas, Lucey to Dyer, at the office of Doan and Dyer, San Francisco,

Lucey said: "It is consensus of opinion that Ranger
 " Fields . . . offer possibilities as great as Okla-
 " homa . . . am so impressed that have author-
 " ized installation of two stores . . . believe you
 " and Doan could make great success but question the
 " advisability of you coming alone. It requires two.
 " You and Doan have the necessary combination of
 " ideas and energy to make good. In my opinion
 " there would be no question of your doing so . . .
 " We will perhaps see the greatest drilling campaign
 " . . . in the history of the country . . . Pos-
 " sibilities are very big and the extent of the field so
 " great that it is difficult to describe them to you in
 " this wire" (Tr. pp. 106-107).

Later Dyer saw Doan and on May 9, 1918, from
 New York wired him at San Francisco: "Carr and
 " Lucey here. They report Texas wonderful. Lucey
 " says had we come when they wired we would have
 " made more than we would have made in California.
 " . . . There is still splendid opportunity . . .
 " Talk this over with Fleishhacker . . . See if he
 " is interested going in game with us, otherwise be-
 " lieve Toronto crowd will back me" (Tr. pp. 107,
 108).

Thereafter Dyer returned to San Francisco and
 later went to Texas and spent five or six weeks on a
 preliminary trip (Tr. 108).

Later Dyer returned to San Francisco and Doan

on July 18, 1922 (Tr. p. 153) wired Dyer from Seattle:

"I arrive San Francisco Sunday morning. Titus "will not be there until August first. Nothing doing "about Texas until he arrives . . . Do not go "until I arrive."

Bearing in mind Lucey's wire and Dyer's wire and Dyer's return to San Francisco from Texas, why was it that Doan wanted to see Dyer before the latter went back to Texas?

Dyer did wait and reported to Doan that there was a wonderful field over there, and what he had seen and they then and there agreed to go in together in those oil fields (Tr. p. 109).

Later this arrangement of theirs was evidenced by the letter of August 9, 1918, (Tr. p. 111) from Doan in San Francisco to Dyer in Texas.

4. DOAN'S LETTER, dated Aug. 9, 1918.

The next thing that happens, is that Mr. Dyer receives the following letter from Mr. Doan:

"My Dear Tom:

"Recd. your letter of the 4th this morning—with clipping enclosed—I am thoroughly satisfied that there are many opportunities in that country and you are on the right line—It takes big money however to do business . . . I have been think-hard about the whole thing—and I have tried to make up my mind what is the best way to handle the situation and I have about come to the conclusion that our first hunch was the best . . .

"I am satisfied Tom that we must first raise at least \$100,000.00 before we can expect to do any business—We must have the money first. It is alright to look the field over and get a line on the propositions—but we must have the money . . . As soon as you have some good things lined up so we have something to talk about, we should then get busy and raise the money . . . LUCEY and TITUS will go and we can get others—We must have a FINISHED DEAL so we can act without hindrance or delay . . . I FULLY APPRECIATE ALL YOU ARE DOING. THE INFORMATION YOU ARE GETTING WILL BE VALUABLE—BUT WE MUST GET TOGETHER AND GET THE MONEY" (Tr. pp. 111, 112, 113).

5. DOAN'S LETTER, dated February 15, 1919. This letter was written in San Francisco to B. T. Dyer at Ft. Worth, Texas, and is as follows:

"I will not be able to reach Ft. Worth much before the first of March . . . don't you think it would be a good idea for you to go to Houston and Shreveport (Louisiana) before I arrive—get things lined up in these fields— even if Hoover and Lucey don't come through I can depend on TITUS . . . and will want to look all the fields over and pick something good. . . . WITH ALL THE DIFFERENT LINES WE CAN WORK WHEN WE GET STARTED THERE WILL BE PLENTY FOR US TO DO, AND WE WILL MAKE GOOD" (Tr. p. 218).

DOAN'S LETTER, dated February 10, 1919.

This letter was written to B. T. Dyer at Fort Worth, as follows:

"Titus will be here to-morrow and I will have a further talk with him. I think he is the only one we can really count on unless Lucey and Hoover are ready to go. . . . I guess WE WILL HAVE TO GO TO THE BAT OURSELVES and when we find something good tie it up. I AM SURE TITUS WILL FINANCE ANYTHING AFTER WE GET IT AND CAN SAY IT IS GOOD. . . .

"WHY DON'T YOU GO DOWN TO HOUSTON AND SHREVEPORT (Louisiana) and get a line up there before I come so we will know where it is best for us to dip in" (Tr. p. 239).

6. DOAN'S LETTER, dated October 12, 1919.

This letter was written by Doan from Shreveport to Mr. Dyer at Ft. Worth, and is as follows:

". . . While there is a big boom on here I have not seen anything that I could recommend to your crowd—That we cannot handle ourselves—and as I said before I cannot afford to mix up with you on any OUTSIDE deals in Louisiana—I don't want to be criticized by Titus and Cap Lucey—So I think it the better policy for you to confine your operations to Texas & Oklahoma for the present—If I should start something else here—it would result in hard feelings and I want to avoid that if I can. . . . you cannot expect to make any money if you make a trip to California every 60 days . . . You are needed in Texas

... JUST FORGET ABOUT THIS
THING OVER HERE—I THINK I AM
CAPABLE OF HANDLING IT AND
THERE IS NO ROOM AT PRESENT FOR
TWO OF US . . .

“NO ONE CAN CRITICIZE YOUR ABIL-
ITY OR INTEGRITY—I HAVE DEMON-
STRATED MY FAITH IN YOU . . .

“EVERYTHING WILL COME OUT FINE
IF WE ALL KEEP OUR NOSE TO THE
GRINDSTONE FOR ANOTHER YEAR . . .

“LET ME KNOW FULLY WHAT YOU
HAVE IN MIND BY LETTER AND
THERE IS ANYTHING TO BE DONE—
when I can co-operate I will be glad to do it”
. . . (Tr. pp. 130-133).

7. DOAN'S TESTIMONY.

The following is from the deposition of Mr. Doan:

“As a compromise matter I told Dyer that if he
would pay me back all his back indebtedness—I
needed money at the time—and carry out his agree-
ment with the North Texas Supply Company,
that I would carry him providing—for a certain
number of shares of stock, if he would discount
it 25 per cent, I would carry him for it; but I
afterwards withdrew that proposition, because he
had not sent me the money he agreed to send me.
. . . That was simply a compromise proposi-
tion. It was made at Ft. Worth. . . . I
waited about thirty days before I withdrew it, to
give him a chance to raise the money; he did not
do it and I withdrew it. I had another conver-
sation with him and told him the thing was all
off, absolutely off, because he had absolutely
failed in the first place to carry out his contract”
(Tr. pp. 261-2).

8. DOAN'S TELEGRAM.

On May 15, 1919, Mr. Doan sent the following telegram from Shreveport to Mr. Dyer at Ft. Worth:

"Better go Burke tonight sell both pieces soon as possible also Eastland acreage. Can use money here better advantage. Things looking fine. Keep me fully posted by wire" (Tr. p. 225).

9. DOAN'S LETTER.

On the 23rd day of January (1920) Mr. Doan sent the following letter to Mr. Dyer:

" . . . If you have to give up one quarter to raise your money I will do it for you on the same basis" . . . (Tr. pp. 196-7).

10. MR. DYER testified fully concerning the relations existing between himself and Mr. Doan and his testimony shows that a partnership must have existed between the parties.

Mr. H. F. Berry testified that he was in Shreveport and met Mr. Doan in January, 1920, and said to him, "Is Dyer interested with you here in your business?" Mr. Doan said: "He is, and I will make him a lot of money" (Tr. p. 82).

F. L. KELLER, testified that he was with Mr. Berry when he had the above conversation with Mr. Doan and heard this conversation (Tr. p. 83).

JACOB BERGER testified that he heard Mr. Doan state in the office of Mr. Berry that Mr. Dyer was interested with him in the Bull Bayou field (Shreveport) (Tr. p. 84).

F. E. COUCH testified that he heard Mr. Doan say:

“He and Tom were going to make a lot of money down there in Louisiana” (Tr. p. 90).

W. L. LELAND testified that he heard Mr. Doan say:

“Tom and I are in a way to make a lot of money down there” (Louisiana) (Tr. p. 93).

MESTRE OLCOTT testified that

“After my arrival in Shreveport on Oct. 1, 1919, I had a conversation with Doan and asked him if Dyer was not coming down to Shreveport with him, and he said that he was going to take care of the Texas end of their business and he was going to take care of the Louisiana end of it” (Tr. p. 99). (Deposition.)

EDWARD J. BUCKINGHAM, (Deposition), testified as follows:

“I asked if Dyer and himself (Doan) were still partners. . . . and he says, ‘Yes we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end’” (Tr. p. 101).

II. WRITTEN CONTRACT.

A contract entered into by means of letters is a written contract. The text in 13 *C. J.*, pp. 298-9, is as follows:

"Offer and acceptance resulting in a binding contract may be through the medium of letters, telegrams, or telephonic communications; and in either case as soon as the offer is thus made and accepted, there is a binding contract."

Let us view some of these letters of Mr. Doan in the light of the above text.

J. F. Lucey was the president of the Lucey Manufacturing Company at this time. This was a large concern situated at Pittsburg.

On the 29th day of March, 1918, he sent the telegram to Mr. Dyer set forth in paragraph 3 of this Brief. It will be noted that he states in this telegram that he believes that Dyer and Doan could make a great success, but questions the advisability of Dyer coming alone. He states that it requires two, Dyer and Doan; that the two have the necessary combination of ideas and energy to make good. It will be noted that this telegram was sent to Dyer and not to Doan. It is very likely that at this very time Captain Lucey had it in his mind to form a combination with Dyer and Doan, as he did afterward.

It was the opinion of this man of business affairs that it would require a combination of these two men to make a success.

We next have the letter written by Doan at San Francisco to Dyer at Fort Worth, Texas.

THE LETTER OF AUGUST 9, 1918

From this letter it seems that Dyer and Doan have been talking over the Texas oil field together, and Doan says in this letter that he has been thinking it over and has come to the conclusion that "our first hunch was the best." He further states that WE must raise \$100,000.00. It is significant that the letter does *not* state that Dyer must raise \$50,000.00 and that Doan must also raise \$50,000.00. It states that WE must raise it all, \$100,000.00.

He also says that it is all right for Dyer to look over the field, and find "some good things," "to talk about," then "we should get busy and raise the money," Lucey and Titus will go in. He further states that he fully appreciates the work Dyer is doing and that the information will be valuable.

In his next letter (see paragraph 5) Doan says that he can depend upon TITUS. In his next letter he states "I AM SURE TITUS WILL FINANCE ANYTHING AFTER WE GET IT AND CAN SAY IT IS GOOD."

In this same letter he says, "Go down to *Shreveport*" (La.).

According to the text in C. J., cited above, we have here a consistent contract.

It will be noted that these letters outline the terms and scope of the contract and the territory to be covered and Louisiana is one of the States included (Tr.

pp. 218, 239, 241). They name the parties that they have in view, Lucey and Titus (Tr. p. 113). It mentions the amount to be raised \$100,000.00, and states who is to raise the money. "WE" are to raise the money. If "WE" are to raise the money and either one of "WE" raise the money, it is the joint act of both. If Doan raises the money after this agreement, Dyer is "WE," as there is a jointure.

This contract recognizes the PARTNERSHIP as actually existing, it is a "WE." Doan testified (Tr. p. 207) with reference to the Lamb Tract: "I told Dyer to go up to Wichita Falls and make a very careful examination of the situation and find out if there was any reason why we should not purchase the property." This contract does not provide that Dyer and Doan will in the future each raise \$50,000.00 and then combine the money and make the \$100,000.00, and then form a partnership. On the contrary the partnership is formed for the purpose of sending Dyer to Texas and looking up "good properties" and giving them something to talk upon so that they can raise the \$100,000.00. By the terms of this contract and the acts and work of Dyer the partnership is actually launched and Dyer and Doan are partners.

The recitals of a contract are conclusive upon the parties to the contract. One of the objects was to raise the money and after this money was raised it was partnership money.

Dyer used his skill in finding the "good properties" and he made no charge for this skill, and Doan used

his skill in finding the money and he could make no charge for this skill.

12. BURDEN OF PROOF.

Counsel contends that the burden of proof is upon plaintiff to establish the fact of partnership by clear evidence, where it is not in writing. In this case the contract is in writing, and in addition, the fact of partnership is established by overwhelming evidence.

13. PARTNERSHIP ESTABLISHED.

From the partnership being established it follows as a matter of law that a fiduciary relation then exists between the parties and they must exercise the utmost of good faith in their dealings toward each other.

Section 2403, C. C., of the State of California provides that in the absence of an agreement on the subject the shares of partners in the profit or loss are to be equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

Section 2435, C. C., provides as follows:—

“ALL PROFITS made by a general partner, in the course of ANY BUSINESS USUALLY CARRIED ON BY THE PARTNERSHIP, belong TO THE FIRM.”

Section 2436, C. C., provides that a general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the

partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

Section 2437, C. C., provides:—

“A partner may engage in any separate business, except as otherwise provided by the last two sections.”

Dyer and Doan were engaged in buying and selling and drilling oil lands.

If either of them engaged in that business by law it would be partnership business, by virtue of Section 2435, C. C., and by Section 2438, C. C., the partner must account to the other for such profit.

Louisiana was within the contemplation of Doan and Dyer as expressed by Doan's letters and if Doan engaged in the oil business in that State he must account. The recital in the letter is conclusive as to Doan.

Section 2403, C. C., cited above, recognizes the well known rule enforced by the master in this case.

Titus joined and supplied money in April, 1919, and had supplied \$40,000 to the partnership before the Lamb Tract purchase (Tr. p. 214), which was May 5, 1919 (Tr. p. 224, telegram, Tr. p. 210 contract).

Then Lucey at the end of May, 1919, came to Ft. Worth, Texas.

After a conference with Mr. Doan, Lucey indicated that he wanted to start a supply business for his

company at Wichita Falls (Tr. p. 316). He could not establish his company in the name of his concern because of some contract which he had with a competing concern respecting that territory (Tr. pp. 215, 298). He therefore agreed with Doan that if they could get Dyer to act as the president of that company and manage it at Wichita Falls, Lucey would put \$50,000 into the partnership (Tr. p. 299). Doan and Lucey talked with Dyer and persuaded him to act as the president of the North Texas Supply Company because that was the only way to get Lucey to join them. So the last of May, 1919, the North Texas Supply Company was organized (Tr. pp. 187, 306). Dyer was made president and the Lucey stock was taken in the name of Doan, Trustee, and thereafter at about the 30th of June, 1919, the Doan Oil Company was organized under the laws of the State of Louisiana (Tr. p. 215) and to the Doan Oil Company was transferred the properties theretofore purchased by Dyer and Doan in Louisiana, Oklahoma and Texas.

Dyer and Doan had many deals together in Texas and Oklahoma.

About the first deal they went into was with reference to some leases in Bosque County, Texas. This concerned about eight or ten thousand acres upon which they made four thousand dollars (Tr. p. 179).

That was in November or December, 1918.

In 1919 Doan had returned to San Francisco (Tr. pp. 180, 210), leaving Dyer in the field. Dyer bought a piece of property from Cockrell in Doan's absence

and paid \$250 down on February 22, 1919, and \$1,000 on March 1, 1919 (Tr. pp. 160, 161).

This deal netted them without advancing any more money the sum of \$7,000 (Tr. pp. 160, 210).

March 14, 1919, Dyer made a deal with Olcott in Eastland County, Texas, and paid \$500 down (Tr. pp. 161, 98-99), and the contract was made in Dyer's name (Tr. p. 99).

In the Olcott deal Dyer paid the lawyer's fee of \$100 to Cleberg (Tr. p. 163).

Then came the Lamb Tract purchase May 5, 1919, when Doan from Fort Worth wired Dyer to buy the Lamb Tract (Tr. p. 224).

The lawyer's fee in this matter was paid by Dyer (Tr. p. 162).

The money going towards the purchase was secured from Titus (Tr. p. 214).

Also dealt with Jergens (Tr. p. 312).

Also with Archer County leases (Tr. p. 312).

14. BURDEN OF PROOF.

In this action Dyer is claiming that a partnership exists between himself and Doan and is also claiming that the Doan Oil Company is an asset. Doan is denying all this and the burden is upon the complainant, Dyer, to establish these facts. We contend that Dyer has established partnership by the letters of Mr. Doan.

Granted that the partnership is established, then a fiduciary relation exists between the parties and it is

the duty of either of the parties to make full disclosures of all matters pertaining to the partnership and to use the utmost of good faith in their dealings with each other.

We quote the following from *Cox vs. Schnerr*, 172 Cal. 371, at page 378:

"The burden of proof usually rests upon the person asserting fraud, but when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that *uberrima fides* which removes all doubt respecting the fairness of the contract. . . .

In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the results of his action."

If Mr. Dyer had released Mr. Doan from accounting to him for the Doan Oil Company and afterward Mr. Dyer had questioned the transfer and sought to set the same aside, after Mr. Dyer had established partnership, the burden would have been cast upon Mr. Doan, under this decision, to have established the fact that the transfer was fair and just. Mr. Doan took the property of the Doan Oil Company without any contract with Mr. Dyer releasing it. How much more then is the burden cast upon Mr. Doan to show that his claim of ownership is fair and just

and how much more is it his duty to make a full disclosure?

When Mr. Dyer establishes the fact of partnership and that the business of the Doan Oil Company was within the usual business of the partnership of Dyer & Doan he has made his case, and the burden is cast upon Doan to show otherwise.

15. SEPARATE TRANSACTIONS.

Counsel urges that the different transactions were not partnership transactions because they were separate and independent transactions. In paragraph 2 of this Brief we have cited and quoted from *Westcott vs. Gilman*, 170 Cal. 562, at page 569, to the effect that a partnership may be organized for one or more transactions or for continuous transactions.

Even if there was anything in the point it would not affect the decision, for the result would be the same. The court would allow an accounting for all the transactions and render judgment accordingly. In this very action the master has allowed the defendant an item of \$3,553.47 on a separate and independent transaction: to-wit, the Santa Maria Syndicate. A court would not reverse a judgment for error if there was no injury (Tr. p. 35).

16. MARKED CHANGE.

Counsel states that after Mr. Doan became interested in the Louisiana field there was a marked change in the relationship of the parties.

When the partnership was started and launched, Louisiana was within the contemplation of the parties. Captain Lucey was one of the assets of the partnership, as was Mr. Titus, and more, Mr. Dyer was in the field finding "good things" to talk about. The letters, the contract between the parties, all relate these things. In paragraph 11 of this Brief we have cited 13 C. J. 298-9, to the effect that the terms of the contract cannot be changed by a letter. If they cannot be changed by a letter they cannot be changed by words spoken.

Mr. Dyer was furnishing his money, his skill and labor and time and expense to the partnership upon the recitals of the contract that Captain Lucey and Mr. Titus were to be members of the syndicate and that Louisiana was to be one of the fields. How can Mr. Doan change, by mere word of mouth, the scope of the partnership and the assets after Mr. Dyer has furnished his services?

17. FORFEITURE.

In paragraph 7 we have set forth the compromise that Mr. Doan offered Mr. Dyer. Briefly, it was that he was to pay up all back indebtedness, carry out his agreement with the North Texas Supply Company and give up to him (Mr. Doan) 25 per cent of his stock he would carry him. Then he testifies because Mr. Dyer did not promptly comply with his request, he says that he absolutely declared it all off and forfeited his stock. This is the shortest cut for the

dissolution of a partnership known. Equity will not enforce a forfeiture and will generally relieve from a forfeiture. Mr. Doan injured his case when he related this procedure in a court of equity.

In *Lanpher vs. Warshauer*, 28 Cal. App. 457, at page 460, the Court said:—

“It is urged, however, upon the part of the respondent, that, conceding the existence of such co-partnership during the earlier stages of the work upon the premises in question, the plaintiff, by refusing to go on with the work, has waived or forfeited his right to come into a court of equity and have an accounting transaction and to relief in a court of equity. But we do not understand it to be the law either that a partnership is dissolved by the failure on the part of one of the members in some respect to perform his duty or obligation to it; or that he thereby loses his right to come into a court of equity and have an accounting and settlement of the partnership affairs.”

In *Whitley vs. Bradley*, 13 Cal. App. 720, at page 729, the Court said:

“But it by no means follows that, because one partner may not put up his share of the capital under an agreement to form a partnership, the combination so formed is any the less a partnership.”

In *Kimball vs. Gearhart*, 12 Cal. 28, at page 48, the Court said:

“ . . . The facts sufficiently show, . . . that Kimball and Howe were partners in this ad-

venture, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property."

The text in 30 Cyc. 439, is as follows:

"The law does not favor forfeitures, and it does not treat the mere failure of one partner to pay his share of CAPITAL, or of firm expenses, or of firm debts, or to charge himself on the firm books with moneys received on behalf of the firm, as a cause for forfeiting his interest in the firm property. Such a failure may bar him from specific performance of certain provisions of the partnership contract; but it will not justify his co-partners in exercising the powers of a court of equity and ejecting him from the partnership."

18. INDEPENDENT TRANSACTIONS.

At pages 10 and 11 counsel squarely presents the question, can Doan engage in the oil business in the State of Louisiana?

Our answer is that he cannot. That in engaging in the oil business in the State of Louisiana with Captain Lucey and Mr. Titus he violated his contract with Dyer. The letter contract designates the fields of operation as Texas and Louisiana, and designates as persons contemplated to be interested with them as Mr. Titus and Mr. Lucey, and more, the letter asks the aid of Mr. Dyer in raising \$100,000.00. With this understanding, Mr. Dyer did his part and Mr.

Doan acknowledged that the information that he furnished was valuable. All these matters are set forth in the letter contract.

Now, Mr. Doan forms the Doan Oil Company in the State of Louisiana and engages in the oil business. Under Section 2435, C. C., this is within the scope of the business to be carried on by Doan & Dyer, and more, he is carrying on business with parties designated by the firm of Doan & Dyer, so this business must be firm business.

More, Mr. Doan was to devote his time to the firm of Doan & Dyer, and here he was devoting all his time to the firm of the Doan Oil Company. Also Mr. Doan ordered Mr. Dyer to keep out of Louisiana. Under Section 2438 Mr. Doan must account to the firm of Doan & Dyer for his interest in the Doan Oil Company. The \$100,000.00 that Mr. Doan invested in the Doan Oil Company is an asset of the Doan & Dyer partnership. Titus and Lucey are assets and prospects of the Doan & Dyer partnership. Louisiana and Texas are its field, and the only way that Mr. Doan can change the contract entered into between him and Dyer is by a dissolution and accounting of the assets.

AI. There are two Mr. L. E. Doans. First, there is the Mr. L. E. Doan that counsel is describing to the Appellate Court in his Brief, and whom counsel very concisely presents at page 14 in the following language:

“The uncontradicted evidence supports and cor-

roborates this testimony which is to the effect that Doan was the 'boss,' dictated the terms of every transaction, advanced the money to acquire the properties, dictated the terms on which they should be sold, assuming the entire risk, and held title to the properties in his own name. . . . But Doan at no time called upon Dyer to share any losses."

This is the same L. E. Doan that was sitting sad and discouraged in his office in the Balboa Building in San Francisco in the fall of 1918 amid the wreck of his Santa Maria Syndicate and writing to Mr. Dyer, who was at Fort Worth, Texas, that he had no money of his own to put into the oil business; that it would be necessary to raise at least \$100,000.00. "We must have the money first." He was then asking Dyer to line up "some good things," so that they could raise the money. Mr. Doan, at that time, as he sat there in his office, appreciated the work that Mr. Dyer was doing for him in Texas, at least he wrote that he did. He wrote that he felt sure that he could get Titus, he also felt pretty sure of Mr. Lucey (Tr. pp. 111, 112, 113). The information and the work that Mr. Dyer did for him must have been effective, for Mr. Doan testified, "I think I had about \$40,000.00 from Titus before the Lamb purchase" (Tr. p. 214). This was May 5, 1919 (Tr. p. 210).

Now we are ready to take up the Brief of counsel understandingly. After a preliminary statement of the facts of the case, counsel, at page 6 of his Brief, states that the issues are simple and would be easy of

determination were it not for the fact that there is a great conflict in the testimony given by the respective parties.

It will also be noted that in this great conflict of testimony the Court below adopted the testimony of the plaintiff, Mr. Dyer, and gave judgment accordingly. If there is a great conflict in the testimony, as stated by counsel, how hopeful can he be that this Court will disturb the decision of the Court below?

A2. At the same page counsel states that Mr. Dyer was connected with the North Texas Supply Company and the American Oil Engineering Company, and that during all of this time Mr. Doan, independently of Dyer, devoted his entire time and attention to developing properties which Messrs. Titus, Lucey and himself had acquired in Louisiana, in which Doan invested \$100,000.00 of his "own funds."

In paragraph A1 of this Brief we have endeavored to set forth just how his "own funds" were obtained.

Counsel, in this paragraph, says that Doan acted "independently" of Dyer.

Doan was not acting independently of Dyer for the reason that Doan told Dyer to turn in a bill against the Doan Oil Company for the expenses that had been incurred regarding the acquiring of the Oklahoma property (Tr. p. 237). In addition to this we have already referred to two letters wherein Mr. Doan requested Mr. Dyer to visit the Louisiana field and report to him. In addition to this, on October 12, 1919, Mr. Doan wrote from Shreveport to Dyer at

Fort Worth a letter in which he said, "I cannot afford to mix up with you on any outside deals in Louisiana. I don't want to be criticized by Titus and Cap. Lucey." It is significant that Mr. Doan did not say that he did not want to be mixed up with Mr. Dyer on any deals, as that would exclude the Doan Oil Company. The intention was not to exclude Mr. Dyer, but that all deals must be handled through the Doan Oil Company, in the Louisiana field. In this same letter Mr. Doan says: "Just forget about this thing over here—I think I am capable of handling it and there is no room at present for two of us." This is an admission on the part of Doan that Dyer has an interest in this company. He asks Dyer to forget it, not because Dyer has no interest, but because Doan is capable of managing it. He does not say that there is no room there for Dyer; on the contrary, he says there is no room at present, implying that there may be after a while. The very act of writing Dyer not to come to Louisiana shows that there is some connection between the parties.

A3. If the parties were independent of each other there would be no such communication between them. It was by virtue of this connection between them that Doan gave this order, and this connection was the partnership relation. If these parties were acting independently and Mr. Doan were to write such a letter it would be an insult and there is no reason to believe that Mr. Doan intended to order Mr. Dyer to keep out of Texas; on the contrary, he requests him

to let him know by letter what he has in mind. Lastly, Mr. Doan testifies that he makes a proposition to Mr. Dyer which he calls a compromise, to allow him one-half of the stock in the Doan Oil Company on certain conditions (Tr. pp. 190, 195-6). Mr. Doan certainly would not give up 50,000 shares of Doan Oil stock for \$1.00 per share when this same stock was worth several dollars per share. There is no evidence to sustain a finding that Mr. Doan was acting independently.

The evidence that sustains a finding that the \$100,000.00 was Doan's own funds, is the following: There is the above testimony that he received \$40,000.00 from Mr. Lucey and there is the admission in the letter that he had no funds to invest and was asking Mr. Dyer to send favorable reports of the oil fields so that they could raise money. Mr. Doan does not make a full disclosure as to the source of his moneys, as he should do, since he is occupying a fiduciary relation to Dyer. In the absence of a full disclosure the presumption of law will be against Mr. Doan.

THE AGREEMENT INTERPRETED IN THE LIGHT OF THE PARTIES' CONDUCT

A4. Under the above heading, at page 8, counsel states that the acts of the parties were several "independent joint ventures" and that there was no partnership between the parties. Under this heading counsel states that Doan was the principal in each

transaction, and supplied the capital. That he dictated the terms of purchase and sale, fixed the purchase price and the sale price and determined all questions of policy; that Dyer was compensated for services rendered in these transactions by a division of commissions or profits earned. Counsel then argues that Dyer was an agent, and was in no sense a partner.

Counsel then states that Doan bought the property in Bosque County, Texas, aggregating 8,000 or 10,000 acres, and paid the seller out of his own funds 50 cents per acre; that he took the title in his own name; that Dyer sold these leases under a power of attorney, which Doan had given Dyer. That Doan agreed to divide the profits with Dyer. Counsel then goes and cites several similar transactions and then calls these separate independent transactions and states that there was no partnership.

Counsel cites the Burke-Burnett Tract at Wichita Falls, the Tillman County lease, and states that all these transactions were paid for by Doan, except in some cases the initial payment, attorneys' fees and the like. The only payments that were made in some cases were made by Dyer. Then counsel makes the statement that Doan was the "boss"; that he assumed all the risks and paid all the losses, and did not call upon Dyer to share any of the losses. There were no losses ever.

In paragraph A1 we have attempted to show how and why Doan was the "boss," if he was, and why he paid for all the properties, which he did not.

Dyer went to the Texas oil fields and reported to Doan all the valuable prospects he could find and Doan remained in San Francisco, and by the use of this information secured the money from Titus and Lucey, and never made a disclosure of where he secured all this money. That was the reason why the titles were taken in the name of Doan and why Doan paid for the properties. He had all the money of the partnership. None of these acts were independent, there was a connection between all of them and the connection was that the funds, the \$100,000.00, or whatever the amount was, were the partnership funds of Dyer & Doan, and were raised by their joint effort, Dyer in the field and Doan in the office.

As a matter of fact, Doan never put up a dollar of his own money after he got money from Titus the first part of April, 1919. Lucey and Titus put up. Doan played dead safe. (See Tr. pp. 331-332 and 339-40-41.)

A5. Counsel next contends that either Dyer was an agent of Doan, or that they were joint adventures in separate and distinct transactions, and that this position is fortified by the fact that Doan made several separate transactions on his own account, and that Dyer made no objection. Special reference is then made to the Wehr-Haywood Syndicate in which Doan invested \$1,000.00. It appears from Doan's testimony that, "nothing was ever said whether he was interested or not" (Tr., p. 185).

W. L. LELAND TRANSACTION

The testimony shows that Leland brought a piece of property to Doan & Dyer. Leland wanted some assistance. That Doan said he did not want to go into anything with Leland. Thereupon Dyer loaned \$2000 to Leland. Later on Leland wanted Dyer to take an interest in the property for the loan. Dyer had to acquire a small interest in a deal with Leland, one-half of which he sold to Delaney for one-half of what he loaned Leland (Tr., p. 124).

Counsel then states that Dyer had an independent transaction with W. L. Leland and did not account to Doan.

W. L. Leland testified that he understood that Dyer sold out for the same price that he paid him (Tr., p. 94).

A6. *Dennis vs. Gordon*, 163 Cal., 427, bears a close resemblance to the case at bar. Dennis and Gordon were partners, doing business under the firm name of Dennis-Gordon Company. There was no capital; its business was buying and selling of oil—oil lease and real estate, either for others or on commission—and the promoting of oil companies and oil lands. There was no agreement that either should contribute money to the business. Necessarily, the transactions would be separate and distinct, just as in the case at bar. Under these circumstances Gordon went into a deal in oil lands which, of course, was

within the scope of the ordinary business carried on by the parties and refused to account to Dennis. The Court said:

"Gordon informed Dennis of this proposition, stating to him that the land had to be developed; that it was Government land not proved up; that it was a wildcat proposition, and very much of a gamble; that it would take \$1000 if they went into it together; and proposed that if he would go in for one-half of it they would take it for the firm. Dennis refused to go into it; that he was without funds to invest in it himself, and that he would not go into anything in which McLeod was interested. . . . The four then began the erection of derricks for drilling. . . . These were the services referred to as part of the consideration given by Gordon for the property. It does not appear that much of Gordon's time was spent therein or that it seriously interfered with his proper attention to the affairs of the Dennis-Gordon Company. . . . Oil was found. . . . The services of Gordon in this enterprise were all performed after he had made the proposal to Dennis above stated, and after Dennis had refused to go into it. If this refusal was not procured by concealment or misrepresentation, the consent of Dennis that Gordon might go into it on his own account, and his refusal to allow the firm to take a part in it, would estop him from claiming that Gordon's subsequent reasonable attention to the new enterprise, not materially interfering with his attention to the firm business, should nevertheless inure to the benefit of the firm."

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"The relation between partners is confidential. . . . In the conduct of the business each must act in the highest good faith toward the other, and may not obtain any advantage over him by the slightest misrepresentation or concealment. . . . A general partner who agrees to give his personal attention to the partnership business may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it (Sec. 2436). Except as thus bound he may engage in any other business without being accountable to the firm for the profits thereof" (Sec. 2437, 2438).

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"McLeod offered Gordon a one-fourth interest in this contract with the locators, for the sum of \$2100. He also offered to loan Gordon the money to pay this interest. Gordon informed Dennis of the offer of the interest and proposed to let him in on the deal on the same terms, but he did not say anything about McLeod offering to loan him the money. . . .

As a partner of Dennis he was under no obligation to use his own credit in borrowing money to loan to Dennis to enable Dennis to go into the deal either as a member of the firm or on his own account. . . . If he had advanced such money, the transaction would have been an individual matter between them and not a part of the firm business. . . . So far as he appears to have been concerned with it, the business was in no wise adverse to the interests of the firm. No reason appears why he could not buy an interest in it without taking it as firm property."

A7. From this case it appears that where a partnership exists, as in the case of Dyer and Doan, and anything within the scope of the business is offered to one of the partners, it is the duty of this partner to present it to the other partner and to make a full disclosure to the other partner, and if the proposition is turned down by the other partner, then the first partner may invest his private capital in the proposition. But before a partner can invest his own money in any such property he is duty bound to give the firm a first chance to take up the proposition.

Doan pretends that the Doan Oil Company is a separate and independent venture and that there is no connection with Dyer and this investment. There are two reasons, as stated in the *Dennis* case, why Dyer is interested in this Company; first, Doan invested funds in this Company which were raised by the aid of Dyer, and secondly, the business of the Doan Oil Company was in the same line as the business of the Doan & Dyer Company, and each of the partners had agreed to devote their time and attention to the Doan & Dyer Company.

In *Dennis vs. Gordon*, 163 Cal., 427, the Court said it was not incumbent upon one partner to advance money for the benefit of the other, where there was no capital stock; the rule would be different where there was a capital stock, as in the case of the Doan & Dyer Company. If a good prospect was presented to Mr. Doan in the State of Louisiana, whether or not there

was a capital stock, it would be the duty of Mr. Doan to get the refusal of Mr. Dyer before he could invest his own money in the prospect. If there was a capital stock, or if Mr. Dyer was willing to put up his own money, Mr. Doan could not invest his private funds in the project and then claim it as his individual property.

LOUISIANA

Referring to Appellant's Brief at page 16 to the relationship of the parties from May 30 to March 22, 1922, counsel say there was a marked change in the relationship between the parties from the time Doan began operations in the State of Louisiana.

In saying this they are in error.

April 10, 1919 (Tr., p. 331), was the first payment on Louisiana property, and from that time on Dyer was as much interested as Doan in Louisiana (*Clark & Greer*, Tr., p. 221).

It has been shown by disinterested witnesses that Dyer was interested with Doan over in Louisiana and Dyer also so testified. The whole course of dealing between the parties conclusively shows that Dyer was interested in Louisiana.

How can the following be explained otherwise?

On May 15, 1919, from Shreveport, Doan wired Dyer at Fort Worth, "Better go to Burke tonight; sell both pieces soon as possible, also Eastland acreage.

Can use the money here to better advantage. Things look fine" (Tr., p. 225).

Again on May 16, Doan wired Dyer, "We have bought several pieces. Will tell you details later this week. Like Shreveport as best place to do business" (Tr., pp. 225, 226).

On May 18, Doan wired Dyer from Shreveport, "We have made big purchases here of wonderful properties and need the money" (Tr., p. 226).

On June 11, 1919, from San Francisco, Doan wired Dyer, "Leaving for Shreveport Sunday night. Have arranged everything satisfactorily. Glad to hear good news" (Tr., p. 227).

Dyer testifies that this telegram from Doan was with reference to the Giffin well in Louisiana (Tr., p. 306).

And on June 17, 1919, from Shreveport, Doan wired Dyer, "Giffin well completed. Looks fine. Hundred barrels. Everything in all fields looks encouraging" (Tr., p. 228).

On June 24, 1919, from Shreveport, Doan wired to Dyer, "That well came in as a big gasser. No oil yet. Don't look good."

On June 25, 1919, from Shreveport, Doan wired Dyer, "Titus and I have bought eighty acres of good stuff" (Tr., p. 231).

On July 7, 1919, from Shreveport, Doan wired Dyer, "Giffin well pumping over one hundred barrels. Hard cash offered for twenty-five thousand for

Bull Bayou forty. We are putting up rig there now. Also drilling the second well on Giffin lease in the morning. . . . Everything fine here" (Tr., p. 231).

On July 8, 1919, Doan wired to Dyer at San Francisco, California, "Well on adjoining forty Bull Bayou flowing over a thousand barrels from top of sand. Our ten-inch casing cemented today. . . . Everything going fine here" (Tr., p. 233).

Doan testified: "The Clark & Greer well is the forty-acre tract that I purchased in Louisiana and upon which I made the first payment April 10, 1919" (Tr., p. 233).

On July 18, from Shreveport, Doan wired Dyer at San Francisco, as follows: ". . . Drilling at Bull Bayou big well just in near southeast corner of Pine Island lease which absolutely proves all of it. . . . Come soon as possible" (Tr., p. 234).

July 28, 1919, telegram from Doan at Shreveport, to Dyer at Fort Worth, "I will be here balance of week. Everything going fine" (Tr., p. 235).

Telegram August 12, 1919, Doan, Shreveport, to Dyer, Fort Worth, "Have made arrangements to leave here tomorrow night; going to southern Louisiana to look over some leases" (Tr., p. 235).

Telegram August 29, 1919, Doan, from Shreveport, to Dyer at Wichita Falls, "McDevitt says our forty in Oklahoma is sure to come in. Better stop sales at low prices until we have time to investigate" (Tr., p. 236). This refers to the Tillman County Couch purchase.

Letter from Doan at Shreveport, to Dyer, Fort Worth, dated September 1, 1919, "We are drilling three wells now. Will start another one next week, possibly two wells. Before these wells are completed with all equipment, tanks, standard rigs, etc., they will require an outlay of nearly one hundred thousand dollars. After they are completed I hope we will have production enough to take care of our future development so that we will not be in need of any more money.

"I made a sale today of 1500 acres of our Bull Bayou wildcat for \$12,500. The parties purchasing will drill and prove it up for us. This will leave us over a thousand acres in the clear. The Bull Bayou well is going rather slowly on account of the strong gas pressure. They promised, however, to set the six-inch pipe some time this week, and it will be a matter of two weeks after that before the well is completed" (Tr., p. 241).

Letter from Doan at Shreveport, to Dyer, Fort Worth, dated September 16, "I wrote you yesterday we are held up for a day or two in finishing our well on account of freight congestion. Will let you know as soon as we get going . . ." (Tr., p. 243).

Letter dated September 20, 1919, from Doan at Shreveport, to Dyer, Fort Worth, ". . . It is raining here today and if it keeps up I don't know whether we will be able to see our No. 1 Pugh well brought in or not" (Tr., p. 244).

long to us. I am endorsing same to the Doan Oil Company. The balance of this lease was sold in two pieces. The remaining fifteen acres has been sold and a payment is up on it" (Tr. p. 198).

W. L. LELAND testified: "I had conversation with Doan respecting Louisiana at Fort Worth. Sometimes Dyer was present. . . ." (Tr. p. 92).

"Shortly after Doan made his trip to Louisiana, when he bought the forty acres from Greer and Clark, then on subsequent trips he made down there I had conversations from time to time with him referring to Louisiana property. It was pretty early in April when he made the first purchase. He showed me maps when he came back. He suggested I buy an adjoining piece and I went down and looked at the land. . . . The first conversation, I think, was in the morning he returned from Louisiana back to Fort Worth. . . . Doan said, 'Tom and I are in a way to make a lot of money down there'" (Tr. p. 93).

F. E. COUCH testified: "I had several conversations with Doan respecting Dyer in Louisiana at different times. I remember I talked with him in July and August; he had been down to Louisiana on several trips. This was in 1919. . . . I remember that in one conversation he stated that he and Tom were going to make a lot of money down there in Louisiana" (Tr. p. 90).

JACOB BERGER testified: "Mr. Doan brought maps up to C. J. Berry's office to make us familiar with the

Louisiana oil field. . . . We were looking the maps over and I asked him if Mr. Dyer was interested in the oil business with him. He said he was. The maps were of the Bull Bayou field. It was a few miles out of Shreveport.

"Later I asked him if Mr. Dyer was interested in this particular production. He said he was" (Tr. p. 84).

F. L. KELLER testified: "I was present when Mr. Berry asked Mr. Doan at Doan's office in Shreveport where Tom Dyer was. Mr. Doan said he is up at Wichita Falls running the Supply house. Mr. Berry said, 'Well, is he in with you here in the oil business?' Mr. Doan said, 'Yes, and I am going to make him a lot of money'" (Tr. p. 83).

H. F. BERRY testified: "Between January 20 and 25, 1920, at Mr. Doan's office in Shreveport I had a conversation with Mr. Doan. . . . I said, 'Is Dyer interested here with you in your business?' Doan said, 'He is, and I will make him a lot of money'" (Tr. p. 82).

Again a few days later at Mr. Doan's office at Shreveport, in the presence of Mr. Berger and Mr. C. J. Berry, Mr. Berger asked Mr. Doan if Mr. Dyer was his partner down there in the oil business, and he said he was (Tr. p. 82).

MESTRE OLCOTT testified: "After my arrival in Shreveport on October 1, 1919, I had a conversation with Doan and asked if Dyer was not coming down

to Shreveport with him and he said that he was going to take care of the Texas end of their business and he was going to take care of the Louisiana end of it (Tr. p. 99).

EDWARD J. BUCKINGHAM testified: "About a year ago I had a conversation with Doan at which Dyer and some other men whose names I don't remember were present in the dining room of the Fort Worth Club. Dyer spoke to us with reference to some land which he said he and Doan had in Louisiana and he said they had a 320 acre tract which was about three or four miles from a tract of land which they had secured and a well had just come in. . . . He said he was not familiar with it and he wanted me to come down and meet Mr. Doan in the evening, and we went down and had a talk over it with Doan (Tr. p. 100).

"Later in February of this year I asked Doan if Dyer and himself were still partners and Doan said, 'Yes, we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end' " (Tr. p. 101).

L. E. H. DE SALLIER: "Doan stated in regard to the lands in Tillman County that he could not reach any decision and for me to see Dyer, his partner, at Wichita Falls (Tr. p. 101).

"Doan stated that with regards to that land, he did not wish to make any price—set any price for sale until he had consulted Dyer" (Tr. p. 102).

A. P. JERGENS testified: "I had a conversation with Doan regarding Louisiana at about the time that Dyer was organizing the Supply Company at Wichita Falls during the year 1919. Conversation took place in the room of Doan and Dyer. Doan, Dyer and myself were the only persons in the room. Doan had returned from Louisiana. He had a map of the oil fields and we were talking about conditions there, and I put the proposition up to him whether or not he wanted me to come in on it, and he said, 'Well, I think we have got it all financed. . . . Here is where we are going to make a clean-up,' and that they had been offered a profit on one of the tracts that he had acquired. As to the names, he said that were financing it to the best of my recollection he mentioned the name of Mr. Lucey and someone else" (Tr. p. 104).

"In the conversation with reference to Louisiana, I asked Doan if I could not get in on it, and he said, 'I think we will get the matter all financed.' He said, 'Lucey and Titus are coming in with us and I think we won't need any more money'" (Tr. p. 105).

JOSEPH MARTIN testified: "I remember some conversation with reference to some oil tank cars about May, 1919.

"Doan said, 'Some time you will see Doan and Dyer's name on the cars for the oil that came out of Burke Burnett field.' That is in Burke Burnett, where they had some property" (Tr. p. 292).

LESLIE J. COGGINS testified: "I know Doan and Dyer. I saw them in Texas in 1919, in May. Mr. Martin and myself met them at Wichita Falls. They said they owned a five acre tract there. Mr. Doan or Mr. Dyer said, 'Well, Mr. Martin, some day—you see those tank cars over there?—you will see our names on them, "Doan & Dyer"; we will get it right up here in this little field' " (Tr. p. 204).

SANTA MARIA-DOAN SYNDICATE

Doan's testimony is that Dyer owed him money on the Santa Maria wells. That Doan demanded it of Dyer. That Dyer never requested a statement (Tr. p. 223).

Dyer's testimony is as follows:

"Doan never made any demand on me on the Santa Maria account until the telegram of December, 1919" (Tr. p. 302).

That telegram was from Shreveport to Dyer in New York, and is dated December 9, 1919 (Tr. p. 159), and is as follows:

"I have obligations to meet January 1st. Can you send me six thousand dollars advanced by me your account Santa Maria well. Answer."

Dyer continues: "I had several talks with Mr. Doan and offered to get the money to pay him (Tr. p. 302). He told me that he was selling off the salvage and there would not be a great deal, and leave

the matter until the salvage money had come in and when that was cleared up he would give me the amount; that it would not amount to very much and he would let it run that way" (Tr. p. 302).

Dyer from New York answered Doan's telegram as follows:

"December 19, 1919.

"L. E. Doan,
Shreveport.

Your wire nineteenth received just as I am leaving for California. I will arrange Santa Maria obligations from California if I am not in Texas before, but ask you to send statement Van Nuys Hotel to meet me if possible in time. Did you close Santa Maria account since salvage? This was not done our last talk on this. At same time will you have Doan Oil Company statement Van Nuys for me and also your and my joint account regarding Doan Oil Company and Louisiana. Will be glad settle both accounts if you wish. Try have this for me so I can meet your request. Will be Van Nuys for Christmas and keep touch with you" (Tr. pp. 293-4).

This telegram was not answered and on December 29, 1919, Dyer from Los Angeles telegraphed Doan at Shreveport:

"Received no word or Santa Maria information at Los Angeles. Will fix this up if you can send it here" (Tr. p. 294).

The Santa Maria statement was not sent to Dyer and the other people interested in that matter until long afterwards.

This Doan Syndicate—Santa Maria well—statement was *not* submitted until September 22, 1920, from Shreveport, Louisiana, to Dyer. "I am enclosing you herewith final statement of the Doan Syndicate at Santa Maria . . ." (Tr. p. 265).

The statement follows and is dated September 15, 1920 (Tr. pp. 266, 267).

In this connection in Doan's statements that Dyer owed him money on Santa Maria and that he had demanded it, see letter from Dyer to Doan dated Ft. Worth, January 10, 1920 (Tr. p. 252).

"I do not know the Santa Maria books at all."

Showing that in December, 1919, when the telegrams above mentioned were sent, Doan was looking for the Santa Maria books and that it was not until months afterwards and, in fact, after this litigation started that he submitted to the members of the syndicate a statement of that operation.

And to that point Mr. Doan testified (Tr. p. 342) as follows:

"The Doan Syndicate deal referred to in this account refers to the Santa Maria properties referred to in the trial. I delivered to Dyer an accounting of the Santa Maria property several months ago, *I think before this suit was started.*"

Inasmuch as the answer was sworn to on the 22nd day of June, 1920, Mr. Doan was mistaken (Tr. p. 14).

DOAN testified: "I stated those things to Dyer at Fort Worth on January 21, 1920. I fix that day because Dyer gave me a check for \$3000 in payment . . . That was with reference to the Santa Maria well and was money that I had advanced for Dyer on the Santa Maria well, a California proposition. He had never requested from me an opportunity to pay it before or a statement from me so that he could pay it" (Tr. p. 223).

"You have never offered to do it" (January 21, 1920) (Tr. p. 193).

This testimony of Doan's is, of course, in direct conflict with the telegrams of December 19, 1919 (Tr. p. 293), and that of December 29, 1919 (Tr. p. 294). Doan also testified that in San Francisco in November, 1919, Dyer insisted on a settlement (Tr. pp. 404-405).

DYER testified: "I was willing to put up my equal share at any time . . . but Doan told me, 'Just let it ride the way it is.' They were going to re-organize" (Tr. p. 387).

GENERAL PETROLEUM CORPORATION

A contract was entered into on the 16th of April, 1920, between the Doan Oil Company, a corporation, first party, and L. E. Doan and Louis Titus, second parties, and General Petroleum Corporation, third party.

This recited the ownership by first party of the Pine Island lease, and that the second parties own or con-

September 22, 1919, telegram from Doan at Shreveport to Dyer, Fort Worth, "Well will be drilled in tomorrow, but heavy rains make it impossible to go. Would like for you to come anyway" (Tr., p. 237).

Telegram from Doan to Dyer, dated October 7, 1919, "Well has dropped to 500 barrels . . ." (Tr., p. 237).

Telegram dated October 11, 1919, from Doan at Shreveport, to Dyer, Fort Worth, "Big well down to 250 barrels. Will take drill stem out next week and see if can bring it back. So much rain here impossible to get anywhere or do anything" (Tr., p. 238).

Letter, October 25, 1919, "I have written Titus about the American Oil Engineering Company. A little later on after our wells on Section 6 are completed, we may take it up with them. But I don't want you under any circumstances to mention it until we are ready to talk business because I will have to go over the matter fully with Titus before I can offer anything. . . . The well has come in across the river near some of the wildcat acreage in Bull Bayou—better than 200 barrels. I may sell some for from one hundred to two hundred" (Tr., pp. 246, 247).

Letter from Doan to Dyer of October 27, from Shreveport (Tr., p. 248), "I am leaving Wednesday from Washington. Had a wire from Titus this morning to meet him and Captain Lucey. We will discuss income tax and decide on whether it will be advisable

to sell everything. . . . Will let you know soon as I return what we decide on. We cannot offer anything until the wells on the eighty are completed. This will be after November 15.

"Our No. 1 well is down to a hundred barrels . . . I don't expect over 500 barrels . . . don't make any overtures to anybody about a sale of the property until you hear from me, as it might interfere with Titus' plans. I don't know what his ideas are, but I think I have convinced him that we should sell some of our properties" (Tr., p. 248).

Telegram from Doan, Shreveport, to Dyer in New York, December 17, 1919, "Tested No. 1 Nelson well 2756 feet. Plenty of oil, but not sufficient gas to flow. Am drilling deeper. No. 2 Pugh flowing 300 barrels. Otherwise nothing new" (Tr., p. 239).

Appellant's Brief at page 42 says, "A partnership relating to the Louisiana operations cannot be proved unless Messrs. Lucey and Titus are included as members of the partnership."

The very first letter of Doan's, after Dyer and he had agreed to go in together in the southern field, and written on August 9, 1918, says, "Lucey and Titus will go and we can get others" (Tr., pp. 111, 113). That includes them, and it is from Doan.

On February 10, 1919, Doan, in another letter, says, "Titus will be here tomorrow and I will have a further talk with him. I think he is the only one we can really count on unless Lucey and Hoover are ready

to go. . . . I guess we will have to go to the bat ourselves and when we find something good tie it up. I am sure Titus will finance anything after we get it and say it is good. If Titus is still anxious to form a company I will try to get some others in, but if he is not anxious, I will drop the matter until we have something lined up" (Tr., pp. 239, 240).

On February 15, 1919, following, Doan wrote Dyer, "Even if Hoover and Lucy don't come through we can depend on Titus. We will want to look all the field over and pick something good. We cannot hurry and will not lose anything by waiting" (Tr., p. 218).

This was followed up and Titus gave Doan \$40,000 before the Lamb purchase which was on May 5, 1919 (Doan's testimony, p. 214).

Regarding this Lamb tract Doan testified, "With reference to the Lamb tract, I told Mr. Dyer to go up to Wichita Falls to make a very careful examination of the situation and find out if there is any reason why we should not purchase the property" (Tr., p. 207). Doan tries to blame Dyer on this purchase, but see his wire, "Do not lose Lamb piece" (May 5, 1919, Tr., p. 224).

A. S. LEACH testified, "I know the Lamb tract. I know that Dyer and Doan bought it about the time that I met them. Doan talked to me, in a general way, about the land before the final payment was made (Tr., p. 95).

Afterwards I made a deal on it, or they made a deal on it through me. That deal must have been along in the fall, a few months after they purchased it. . . . I handled eighty acres of land in Tillman County in April, 1919. I made the deal with Couch. Couch agreed to take it and then told me that Doan and Dyer were coming in with him on the purchase. . . . I talked to Doan about that. I dealt mostly with Couch and Dyer about it" (Tr., p. 96).

The first investment in Louisiana was April 10, 1919 (Tr., p. 331). Later came the investment in Burke Burnett of the five-acre Lamb tract about May 5, 1919 (Tr., p. 224), and the purchase about May 7, 1919, of a half interest in eighty acres in Tillman County, Oklahoma (Tr., pp. 183, 184).

In May, 1919, Titus came to Fort Worth and Doan, Dyer and Titus made a tour of the Burke Burnett, Oklahoma fields and later and towards the end of the month of May, 1919, Lucey came to Fort Worth in company with Doan and they two having talked the matter of a supply company over among themselves, then proposed to organize the North Texas Supply Company to be located at Wichita Falls, Texas, so as to make a place for Doan's son.

The Lucey Manufacturing Company could not engage in business in that territory because of a contract with the Continental Oil Company (Tr., pp. 215, 298, 300).

Lucey proposed that Dyer be made the president.

Lucey testified, "I picked out Dyer, it was my suggestion and not Doan's suggestion to me" (Tr., p. 316).

Dyer, to Lucey and Doan, absolutely refused to go into the supply business (Tr., pp. 298, 187). Thereupon Doan requested Lucey to retire so that he could speak to Dyer alone. Doan then told Dyer that if he would take the presidency of the North Texas Supply Company Lucey would put \$50,000 in with them in Shreveport, and that money was needed at Shreveport (Tr., p. 299).

Therefore, in order to get Lucey in, Dyer agreed to head the North Texas Supply Company (Tr., p. 299).

Dyer testified that no such conversation occurred as stated by Doan respecting Dyer's getting money from the California Syndicate, taking in the North Texas Supply Company, organizing the drilling companies, and devoting all of his time to the North Texas Supply Company (Tr., pp. 309, 310 top).

Captain Lucey suggested that it would possibly be a good plan to let some contractors have rigs on a fifty-fifty basis and Dyer says when the rig did come in it was turned over to a man named by Captain Lucey who made a failure of it, and that no success could be made with a drilling company or a rig company at that time because the Commission would not allow people to bring the wells in and the contractors lost money (Tr., p. 310).

However, the matter of Lucey coming in depended also on Titus subscribing to stock in the North Texas Supply Company.

(See telegram of June 2, 1919, from Titus in Washington to Doan at Fort Worth.) "I am very glad to have Lucey subscribe \$50,000. His first \$25,000 must be in your hands in Shreveport in time for \$50,000 payment on Pine Island property. I will subscribe ten thousand to a supply company. . . . Is it not feasible to organize a company on usual basis and sell enough stock to at least drill a well?" (Tr. p. 253).

Later, on June 30, 1919, in accordance with the arrangement made by Titus to Doan, Lucey and Dyer, the Doan Oil Company was organized (Tr. pp. 215, 169).

PROPERTIES THAT WENT INTO THE DOAN OIL CO. AT PAR

About the time of the purchase of the Lamb tract (five acres Wichita County, Texas, at Burke Burnett), Couch testified: "I told Dyer I had bought some acreage over there (Tillman County, Oklahoma), and that if he and Doan wanted half of it they could have it. Dyer told Doan over the telephone that I told him they could have it, and he said that it was all all right" (Tr., p. 91).

"I told Dyer that if he and Doan wanted to share in the purchase of this it was all right with me" (Tr. p. 87).

"This land cost between \$8000 and \$9000" (Tr. p. 87).

"A little over \$4000 for each half. The early part of June I paid back \$5387.50 on this purchase, which left forty acres" (Tr. p. 88). Thus showing a profit to Dyer and Doan of over one thousand dollars and with forty acres left.

"Both of these tracts, i.e., the Lamb tract, five acres, Tillman County, Oklahoma, lease were by Doan, with the consent of Dyer, conveyed to the Doan Company" (Tr. pp. 184, 221). Does this look as though Dyer was interested?

On page 13 of their Brief, counsel say the attorney's fees for passing title on the Tillman County, Oklahoma leases, amounting to \$25, were paid by Dyer and that the account rendered by Dyer to Doan also shows that Dyer held in his possession \$2092.50, representing the commission of the amount received from the sale of this property, but does not explain that transaction, nor that there was still a balance due Dyer. This account is set forth at page 164 of the Transcript, dated August 29, 1919, as to the Doan Oil Company, and in the letter from Dyer to Doan, February 9, 1920 (Tr. p. 198).

DOAN testified: "I told him to turn in a bill against the Doan Oil Company for the expense that he had incurred in regard to the acquiring of the Oklahoma property and the Burke Burnett property" (Tr. p. 237).

The bill at page 164 of the Transcript is the bill

presented by Dyer. It contained an item for Dyer's one-half interest in the firm automobile. Doan testified:

"The automobile I turned over to the Doan Oil Company and they gave me credit for the full amount" (Tr. p. 346).

The amount for which Doan received credit on this automobile was \$2665 (Tr. p. 339).

The automobile was owned by Dyer and Doan, and when Dyer was in San Francisco Doan took the automobile from Fort Worth over to Shreveport for the Doan Oil Company (Tr. p. 232).

On July 14, 1919, Doan wired from Fort Worth to Dyer in San Francisco: ". . . Will drive car Shreveport tomorrow. Need it there" (Tr. p. 232).

This was fourteen days after formation of Doan Oil Company (Tr. p. 215).

"In the same connection the car referred to is the automobile that Dyer and I purchased in Fort Worth" (Tr. p. 233).

The amount held by Dyer in his own possession, \$2092.50, representing the portion of the amount received from the sale of this property (Tillman County) is shown by the letter dated February 9, 1920, Dyer to Doan, as follows:

"Mr. Couch had given me a check for \$2700, which was one-half on the selling price of twenty acres out of the Tillman County property. As I understood it, this went into the Doan Oil Company. Will you please advise me if this is correct? If not, it will be

trol 50 per cent of the first party's stock, and therefore *first* party hereby grants to the third party the right or option for a period of eight months to purchase the lease of the property hereinabove described for the sum of \$2,000,000.00, payable \$50,000.00 in cash and \$1,950,000.00 in shares of the capital stock of the General Petroleum Company . . . Second parties grant third party the right to purchase 50 per cent of the capital stock of first party for eight months.

. . .

Third. Third party agrees to pay second parties \$50,000.00 in cash and \$200,000.00 in stock of the General Petroleum Company at \$200.00 per share.

Fourth. Third party is granted the right to drill three wells on the lease (Tr. p. 369).

This \$50,000.00 was paid to Doan and Titus and the stock was delivered to them. On May 8, 1920, L. E. Doan and the Doan Oil Company, by L. E. Doan, president, addressed to the General Petroleum Company a letter with reference to the division of the stock and this stock was divided among the then stockholders of record of the Doan Oil Company (Tr. p. 373), as per that letter. Of course, this General Petroleum money and stock belonged to the stockholders of the Doan Oil Company.

LOUIS TITUS

Mr. Titus testified that he had a conversation in July, 1919, with Mr. Dyer and there is a conflict between Mr. Dyer and Mr. Titus as to what occurred.

EDWARD EVERETT

Edward Everett testified (Tr. p. 293) that he was present when Mr. Dyer called Mr. Titus up in December of 1919, and that is the time that Mr. Dyer says he had the conversation, and we urge that Mr. Titus is mistaken as to the time the conversation occurred.

THIRTY-THREE THOUSAND SHARES

On the 10th of November, 1919, Messrs. Doan, Lucey and Titus got together at Shreveport and had a meeting of the Doan Oil Company.

A resolution was adopted in substance that the company offer for sale 100,000 shares of its capital stock at \$1.00 per share, payable one-half on or before December 15, 1919, and one-half on or before January——— and that said stock be first offered to the stockholders as follows: 50,000 shares to Louis Titus, 33,333 to L. E. Doan and 16,667 shares to J. F. Lucey.

If any stockholder failed to take and pay for the stock so tendered him the Board of Directors would decide what further action should be taken with reference to disposition thereof (Tr. p. 171).

Thus it will be seen that the only stockholders in the corporation (the other two directors being dummies) were given the right to buy this stock pro rata, and this right was exercised by Titus and by Lucey and secretly by Doan, who arranged with his relatives

to take a part of it, he himself taking 15,000 shares, of which 10,000 shares he transferred to his son and 5000 shares to Gatch and Morris.

On November 11, 1919, from Shreveport, Louisiana, Doan wired Dyer: "Titus and Lucey here. We have made no plans except to go along as usual" (Tr. p. 158).

Inasmuch as Doan, on the preceding day only, with Titus and Lucey had arranged to issue together 100,000 shares of the Doan Oil Company stock, this telegram of Doan's was an evasion and a trick.

DOAN testified: "I did not notify Dyer at the time this stock was issued that he could get any of it. Dyer already owed me a lot of money and I did not consider he had any interest in it whatever. I did not consider him my partner. I did not put him in touch about it, nor attempt to do so" (Tr. p. 356).

In November, 1919, this stock was worth from five to ten dollars a share (Tr. p. 383).

Doan concealed what was done at this meeting from Dyer and did not let Dyer know that there was going to be a further issue of stock. This right to buy this stock was an asset of the partnership. Doan should have used good faith toward Dyer. He did not.

Hon. Frank H. Rudkin, District Judge, in deciding this matter, held

"Prior to November 10th, 1919, the outstanding stock of that Company consisted of 300,000 shares of the par value of \$1.00 each, 100,000 of which was the property of the plaintiff and de-

fendant under their partnership agreement as found by the Court. On the above date the Board of Directors of the Corporation offered an additional 100,000 shares of stock, of the par value of \$1.00 per share, for sale, at the price of \$1.00 per share, to be paid for, in [57] two equal installments, on or before December 15th, 1919, and January, 1920. This additional stock was offered to the stockholders in proportion to their then holdings, 33,333 shares being allotted to the defendant Doan. It was further provided that if any stockholder failed to subscribe and pay for all or any portion of the stock thus allotted the same should be subject to the further order of the board. The plaintiff had no notice of this resolution and was given no opportunity to subscribe or pay for the additional stock. The effect of this increase upon the rights of the plaintiff becomes at once apparent. His interest in the Corporation was reduced from a one-sixth interest to a one-eighth interest and his right to participate in future dividends was curtailed in the same ratio. The only benefit the plaintiff could derive from the increase was the addition to the capital assets of the Corporation. And if the capital stock of the Company was worth more than \$1.00 per share at that time his loss would necessarily exceed his gain. The Master did not deem it necessary to make a finding as to the value of the stock at the time of the second issue, as the assets of the corporation are susceptible of a division in kind, but he expressed the opinion that the stock was worth considerably more than \$1.00 per share, and found that the right to purchase the additional stock was a valuable one and was a partnership asset. The opinion thus expressed and the finding as to the value of the preferred right is fully supported by the testimony. On March 20th, 1920, two days before the repudiation of the partnership agree-

men by the defendant, a dividend of \$200,000.00 on the 400,000 shares was declared, and on the 16th of April, 1920, the General Petroleum Corporation was [58] given an 8 months' option on a portion of the property of the Doan Oil Company, or in the alternative on one-half of the capital stock of that Company, for \$2,000,000.00, payable \$50,000.00 in cash and \$1,950,000.00 in stock of the Petroleum Corporation, at the rate of \$200.00 per share. The \$50,000.00 in cash and 1000 shares of stock of the Petroleum Corporation has already been paid or delivered under the option. From these facts it must be apparent that the right to purchase the increased stock at \$1.00 per share was a valuable one and was a valuable asset of the co-partnership. The defendant Doan as a trustee of this stock will not be permitted in equity to derive a profit from his trust, nor will his family or friends, as his nominees, or otherwise. The reason given by the Master for a contrary ruling, namely, that the plaintiff did not have the means to pay for this additional stock is not convincing and does not appeal to me. If the right was a valuable one, as it unquestionably was, little difficulty should be encountered in making the necessary financial arrangements to take up the stock. The 33,333 shares in question will, therefore, be disposed of and divided in the same manner and subject to the same terms and conditions as the original."

That Dyer had ability to take care of this is shown by the letter from Seton Porter, dated December 18, 1919 (Tr. p. 305), and he also testified that he was promised any money that he wanted on this deal by Mr. Fleishhacker of the Anglo London and Paris National Bank (Tr. p. 314).

NORTH TEXAS SUPPLY COMPANY

The North Texas Supply Company was organized about the 30th of May, 1919 (Tr. p. 187).

The reason for this organization was that Captain Lucey could not go into the Wichita Falls territory. It was to be a temporary organization only until the Lucey Manufacturing Company took it over. The reason that Doan wanted Dyer to go into the North Texas Supply Company was that if Dyer would act as president and tide it over temporarily that Captain Lucey would put \$50,000.00 in Shreveport (Tr. p. 301).

The average capital of that company for a year was a little over \$40,000 (Tr. p. 306). Doan put \$5000.00 in for his son.

At the outset it was stated by Captain Lucey that he would take care of a subscription for Dyer (Tr. p. 315) for 10,000 shares. Inasmuch as Captain Lucey did not carry Dyer, it became necessary to sell that stock in order to get the capital, so Doan and Dyer turned that subscription over to Couch. The par value of the stock was \$1.00 per share. The stock was sold at 50 cents per share (Tr. p. 222).

The stock paid right along 1 per cent per month, There was a stock dividend and thereafter the stock paid three-quarters of 1 per cent per month upon the whole issue (Tr. p. 386). The book value of the stock when Dyer presided as president was \$2.18.

It was agreed that if Dyer should succeed in making the North Texas Supply Company a success that

he would be given \$10,000.00 in bonus stock. That bonus stock was to belong jointly to Dyer and Doan (Tr. p. 300).

Dyer at the trial in the District Court testified, at page 214, as follows:

"It was agreed that we were to have bonus stock. I was *not* to share in the bonus stock" (Tr. p. 214).

Before the case was transferred from the State Court to the Federal Court the deposition of Doan was taken and he testified:

"Q. Was he to divide the stock with you?

A. Yes, sir.

Q. Were you to get half the bonus stock?

A. Yes" (Tr. p. 262).

Quite a contradiction. But that is not all.

On September 13, 1919, Doan wrote a letter to Dyer from Houston, Texas, at which place he was with Captain Lucey, in which he said:

"The Captain is much pleased with your showing. Says it is better than he expected" (Tr. p. 142). And still that is not all, for on October 14, 1919, in a letter from Doan at Shreveport to Dyer, Doan writes: "I am in receipt of a letter from Captain Lucey in which he advises that the North Texas Supply Company immediately vote you 10,000 shares bonus stock of the North Texas Supply Company (Tr. p. 148).

On October 13, 1919, Lucey wrote to Dyer and said: "I am in receipt of your statement of September 30. Please accept my congratulations on the

very splendid showing which you have made" (Tr. p. 295).

And Doan testified, at page 222 of the Transcript: "I received a letter from Captain Lucey in which he stated that the volume of business transacted was really more than what he should have done with his capital (Tr. pp. 222, 223). Yet in spite of this splendid showing of increasing the stock from 50 cents a share to \$2.18 a share, of paying dividends at 1 per cent a month, then making a stock dividend of 100 per cent, paying dividends of three-quarters of 1 per cent per month, Doan in 1920 protested against the issue of this bonus stock to Dyer.

AMERICAN OIL ENGINEERING COMPANY

Dyer went into the American Oil Engineering Company, but not until after he had discussed the matter with Doan. "I did not accept anything from them until I discussed the matter with Doan" (Tr., p. 125).

Counsel suggests that the American Oil Engineering Company made a profit on the North Texas Supply Company.

It is not true because the North Texas Supply Company sold them a rig (Tr., p. 165) and the pipe deal was made through the Lucey Manufacturing Company who made the profit (Tr., p. 313).

INTEREST

The parties had been dealing since August, 1918, sometimes one putting up money and some times others putting up money, and we think that in accord with the law of partnership, in the absence of there being any agreement to pay interest, that interest is not chargeable.

Ferrill vs. Jones, 39 Cal., 655;
Adams vs. Lambard, 80 Cal., 438;
Falkner vs. Hendy, 80 Cal., 630; 103 Cal., 26;
Young vs. Canfield, 33 Cal. App., 343;
Carpenter vs. Hathaway, 87 Cal., 434; 30 Cyc.,
441, 443, 698, 699.

Doan had \$40,000 in his hands, according to his own testimony, before May 5, 1919, from Titus (Tr., p. 214).

Doan also testified, "Before the Doan Oil Company was organized Titus had sent me money and Lucey also, and I carried that in my account as trustee for the three of us. When the Doan Oil Company was organized all prior transactions were transferred to the Company and there was a big balance of money in my hands, more than my individual share" (Tr., p. 344).

CALIFORNIA INTENDED INVESTMENT

The California crowd mentioned in the testimony was some San Francisco men that Dyer was to organize a syndicate for.

"Mr. Terry told me that he had about \$50,000 subscribed for an oil company which he could call in at any time" (Tr., p. 216).

"Fifty thousand dollars was to be put into an oil operation upon land to be selected by Dyer" (Tr., p. 216).

"Dyer was to be carried with the San Francisco crowd for a quarter interest, as I understand. He told me that I had an expectation of sharing in that quarter" (Tr., p. 216).

How Mr. Doan handled this California project appears from his own letters.

On September 16, 1919 (Tr., p. 243), he writes: "I think it would be a good idea for Mr. Delaney to come over here as soon as he can. You can tell him that the Southwestern Gas Company have eight or ten thousand acres southwest of Homer which they will turn over to me on some kind of a proposition. If Mr. Delaney was here on the ground he might pick up something good for your company" (Tr., p. 243).

The first paragraph refers to Dyer's \$50,000 California company (Tr., p. 244).

Another reference of Doan's to the California

crowd is in his letter of September 1, 1919, and Doan testifies, "The first paragraph of that letter refers to an eighty-acre piece that Dyer told me he was figuring on buying for his California people. I told him to go and investigate it and find out if an oil well had been brought in and if so it would be a good thing for the California Company" (Tr., p. 243).

On September 13, 1919, he writes, "I will see if anything can be picked up in Homer (Louisiana). Have not had much time to look into things up there. Will try and find something. Giffin made a sale yesterday—\$1250 commission—of which Doan Oil Company gets half. I will get his salary all back pretty soon" (Tr., p. 145).

Under date of September 15, 1919, he writes, "Mr. Ray has just received information from a driller friend of his who is drilling a well ten or fifteen miles southwest of Homer.

"It looks very much like they will bring in a well. I am going to make a thorough investigation and if I can verify it will let you know. It might be a good opportunity for your California bunch, and I will probably take some for the Doan Oil Company" (Tr., p. 145).

On September 20, he writes, "If Delaney is going in with your new organization now is the time for him to be on the ground here because there will be some great opportunities" (Tr., p. 245).

"That refers to the California crowd" (Tr., p. 245).

On October 11, 1919, Doan wired from Shreveport to Dyer, "Better get your California organization together and put them on Pyron lease or something" (Tr., p. 238).

Contrast letters of September with letter of October 12, written by Doan from Shreveport, to Dyer (Tr., p. 130):

"While there is a big boom on here I have not seen anything that I can recommend to your crowd—that we cannot handle ourselves—and as I said before, I cannot afford to mix up with you on any outside deals in Louisiana—I don't want to be criticized by Titus and Captain Lucey. So I think it is the better policy for you to confine your operations in Texas and Oklahoma for the present—if I should start something else here—it will result in hard feelings, and I want to avoid that if I can" (Tr., p. 130).

On October 25, 1919, he writes, "I hope you will be able to find something for your California crowd, but I realize that it is not an easy thing to do. You will find something, however, and can soon build up a big company" (Tr., p. 247).

Is it not singular that Doan has not produced some of the letters written by Dyer respecting this and other matters?

Dyer testified, and Doan admitted (Tr., p. 216) that if they could find a piece of land for these California people Dyer would get one-fourth of the stock, which he was to divide with Doan.

In September it was the view of both of them that they might find a piece of land in Louisiana. In October evidently the "avaricious bug" had crept into Doan's head, and he was looking at things differently.

MARTIN-CONSIDINE DEAL

Dyer testified that he did all that he could and all that was required of him, that he got Terry a map, gave him data and gave him time, procured other maps for him and procured people to buy stock (Tr., p. 306).

On May 6, 1919, from Ft. Worth Doan wired Dyer at Wichita Falls, "Look up production for Terry."

On July 8, Doan wired Dyer, "Wire me all about Terry and Martin deal. Are they going to put it over? Everything going fine here" (Tr., p. 233).

On July 14, he wired, "Go to Martin, Postal Building, find out about Terry deal and wire me."

On July 28, Doan wired Dyer, "Be careful about talking to Martin about Terry deal. See Terry, and if you can help him raise any money, do it. The deal is closed. Is up to Terry and our end to raise more money, otherwise Martin will have it all" (Tr., p. 235).

THE FACTS

The facts show that Lucey wired for Dyer and Doan to go to Texas in March, 1918; that Dyer wired Doan later in May, 1918; that Dyer went to Texas and spent six weeks there; that he returned and made arrangements with Doan; that this arrangement was agreeable is shown by the letter of August 9, 1918 (Tr., p. 711).

That Lucey and Titus were in their minds as suppliers of money was shown by that letter as well as by the letters from Doan to Dyer of February 10, 1919, and February 15, 1919 (Tr., p. 218).

That they did contemplate going to Louisiana is also shown by these letters; that Titus and Lucey did furnish money is also shown (Tr., p. 214).

That Dyer was very active in and about the Lamb tract purchase and the Oklahoma tract purchase is shown by telegrams and letters; that a deal was made April 10, 1919, in Louisiana (Tr., p. 220).

And many deals were made after that. Dyer was cognizant of them all. Dyer's testimony is that he was equally interested in it at all times. If an agreement had been reached in July, 1918, and was carried out as the Master and the Court found, then the next step is May 30, 1919.

At this time Lucey is brought in so as to furnish money, and Doan claims a new deal was made and a new contract was entered into. But Mr. Doan did not plead this in his answer in this case, and the testimony shows, we contend, conclusively that no such

deal was made, that the deal was to get Dyer to handle the North Texas Supply Company in order to get \$50,000 of Lucey's money for investment.

Later on June 30, 1919, the Doan Oil Company is formed. Dyer testifies that Doan told him that their interests were to be: Titus, one-half; Lucey, one-sixth; and Doan and Dyer, one-sixth.

And it would appear that this was the case, for the reason that all of the letters and telegrams are indicative of but one thing—one partner reporting to the other. Everything that transpired in Louisiana down to the time that Doan became so avaricious was reported to Dyer. We have produced Doan's letters and some of Dyer's. If Doan had produced Dyer's letters, there would not have been a demonstration of the matter one way or the other. But they were not produced.

Doan is a lawyer. He says that on May 30 he told Dyer that if he would become president of the North Texas Supply Company he would carry him for an interest in Louisiana, "but I did not tell him what that interest would be." If it were left to Doan it would be nothing (Tr., p. 190).

Doan testified some time in April or the first of May, "I told Dyer that I was going to operate in Louisiana in association with Titus, that that proposition in Louisiana would be on an entirely different basis from anything that had been, that we had talked about before, any deals we had before. That Mr. Titus would be interested with me in everything in Louisiana" (Tr., p. 185).

"As to any conversation in which I advised Dyer that I was not going to operate further in Texas, I told Dyer that on account of the business subsiding the excitement was over, that it was a dangerous thing to speculate in leases, that I had about concluded I would not venture in that deep territory, that I was afraid I would not be able to sell any leases, and I concluded that I would not put any more money in" (Tr., p. 186).

That this is not so was shown by the telegram from Titus to Doan, dated June 2, 1919 (Tr., p. 253), because Doan had wired Titus evidently, as shown by this telegram, asking him to go into a Texas deal.

The correspondence of Doan can be explained upon no other theory than that he was a partner of Dyer's. Later on, in October, he began to get the idea that he could do Dyer up, and the change appears.

Dyer kept pressing for a settlement. He demanded a settlement in November. Doan evaded that upon the ground that his mother was sick. The telegrams of December, 1919, from Dyer to Doan show that Dyer wanted a statement. The letter of January 21, 1920, from Dyer to Doan discloses what the arrangement between Doan and Dyer was, and further shows that Dyer at that time did not know anything about the 33,333 shares. It also shows that Dyer wanted to put up his share of the money (Tr., p. 195).

Note how Doan on January 23, 1920, answered (Tr., p. 196): "If you have to give up one-quarter to raise your money, I will do it for you on the same basis" (Tr., p. 197).

What does that mean?

Dyer immediately answered this letter of Doan's on January 26, 1920 (Tr., p. 197): "You ask me to write by return mail and state that you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis. I want this absolutely agreeable to you either way, and if you prefer to have the money I will get the money and advise you at once" (Tr., p. 198).

Following this up, on February 9, 1920, Dyer again wrote Doan (Tr., p. 198): "I have not had a letter from you in answer to my last letter, asking if it was agreeable as you had mentioned on the carrying of my Doan Oil Company interest" (Tr., p. 199).

Therefore, we urge it is absolutely conclusive that they were equal partners, and we most respectfully request this Honorable Court to affirm the decree of the District Court.

A 11. Let us assume for the sake of argument that the contention of appellant that the parties were acting independently of each other is true; that Doan in April, 1919, changed the relationship of the parties and terminated the partnership if one ever existed; the fact remains that even after the termination there was no settlement of the partnership affairs, and that Doan still continued to hold the assets of the partnership or of the joint undertaking, or whatever it might be called. These assets consisted of \$100,000 raised by the joint effort of the parties, and the information gathered of the various fields by both of the parties,

and especially by the efforts of Dyer, and also the good will of the venture. This good will consisted of the reasonable expectation that Lucey and Titus would furnish money to finance any deal that Doan and Dyer might recommend. The good will is an asset.

Section 655, C. C. California.

"There may be ownership of . . . the good will of a business. . . ."

Section 993, C. C.

"The good will of a business is property, transferable like any other"

Section 1776, C. C.

"One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers."

Section 992, C. C.

"The good will of a business is the expectation of continued public patronage. . . ."

The good will of the business of the firm or joint venture of Doan & Dyer was the expectancy that Titus and Lucey would continue their patronage.

Doan appropriated this good will together with his \$100,000 to his Doan Oil Company and never accounted for any of it to Dyer.

The text in 30 Cyc., 663, is as follows:

"If a partner carries on the business after dissolution, he may be compelled to account to his co-partner for the profits."

Citing

Karrick vs. Hannaman, 168 U. S., 328;

Tracey vs. Power, 127 N. W., 936 (Minn.).

“Appellant’s last contention is, we think, untenable, because it disregards that fundamental principle in the law of partnership which requires good faith and mutual trust between the individual members of a partnership. This rule is aptly expressed in *Story on Partnership* (3d Ed.), Sec. 169, as follows: ‘We come in the next place to the consideration of the rights, duties, and obligations of partners between themselves. And here, it may be stated that, as the contract itself has its solid foundation in the mutual respect, confidence and belief in the entire integrity of each partner, and his sincere devotion to the business and true interests of the partnership, good faith and reasonable skill and diligence and the exercise of sound judgment and discretion are naturally, if not necessarily implied from the very nature and character of the relation of partnership.’ The same thing is equally well expressed in *Lindley on Partnership*, p. 303: ‘The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. Thus if one partner *knows more* about the state of the partnership than another, and, *concealing* what he knows, enters into an agreement with that other relative to some matters as to which a knowledge of the state of accounts is material, such agreement will not be allowed to stand. This obligation to perfect fair-

ness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists, and also to persons who have dissolved partnership but who have not completely wound up and settled the partnership affairs, and most especially is good faith required to be observed where one partner is *endeavoring to get rid of another*, or to buy him out.' The necessity for good faith applies in the case of a sale by one partner to another of his partnership interest, and such sale will be sustained only when it is made for a fair consideration and upon *full disclosure* of all important information as to value. The rule applies *even after dissolution*, where partnership affairs have not been completely wound up and settled.' 22 *Am. & Eng. Ency. of Law* (2d Ed.), p. 105. The same general doctrine is announced in *Pomeroy's Equity*, Secs. 848, 852, 856, 1088."

"In transactions between partners, *concealment* becomes fraudulent when it is the duty of the party having knowledge of the facts to *disclose* them to the other, and obviously an intentional misrepresentation of the facts by one partner to the other would be a greater fraud than mere concealment. *Pom. Eq. Juris.*, Secs. 891, 902."

Ehrman vs. Stitzel, 90 S. W. Rep., 278.

"A person will not be permitted to benefit himself at the expense of the firm. The obligation of good faith is not even confined to persons who are actually partners. It extends to persons negotiating for a partnership, and to persons who have dissolved partnership and have not completely wound up and settled the partnership affairs. *Collier on Partnership*, page 166; *Lindley on Partnership*,

Vol. 2, page 772; 30 *Cyc.*, 438, 659 and 660; 22 *Am. & Eng. Ency. of Law* (2d Ed.), 114. . . .

The reported case applies the principle that members of a partnership should act with the utmost good faith toward each other, in *upholding the right* of a partnership to bring an action against a member thereof to recover for a loss sustained by his misconduct. The cases wherein the question has been considered are but few, but they are unanimous in holding that for a loss occasioned to a partnership by an individual member thereof, the latter is liable *as for damages*. *Wiggins vs. Markham*, 131 Ia., 102, 108; N. W., 113; *Murphy vs. Crafts*, 13 La. Ann., 519; 71 Am. Dec., 519; *Ball vs. Levin*, 48 La. Ann., 359; 19 So., 118; *Bohler vs. Drake*, 33 Minn., 408; 23 N. W., 840; *Hollister vs. Simonson*, 36 App. Div., 63; 55 N. Y. S., 372, appeal dismissed; 170 N. Y., 337; 63 N. E., 342; *Newby vs. Harrell*, 99 N. C., 149; 5 S. E., 284; 6 Am. St. Rep., 503; *Gill vs. Wilson*, 2 Willson Civ. Cas. Ct. App. (Tex.), Sec. 380. See also the following cases which contain dicta to the same effect: *Williamson vs. Monroe*, 101 Fed., 322; *Roberts vs. Totten*, 13 Ark., 609; *Haller vs. Williamowicz*, 23 Ark., 366; *Levi vs. Karrick*, 13 Ia., 344.

In the reported case the individual partner is held to be liable for the *loss of profits*. A case very similar is *Wiggins vs. Markham*, 131 Ia., 102; 108 N. W., 113, wherein it appeared that one member of a firm, which was engaged in selling lands on commission, made a sale of certain lands for the firm, but afterwards cancelled the contract and sold the same purchaser lands of his own. It was held that he was liable to his partner for the amount of *profits* which would have resulted from the original transaction."

Axton vs. Kentucky Bottlers Supply Co. (Ky.),
Ann. Cas. 1915 D—p. 75.

Equity Rule No. 19 provides:

"The Court in every state of the proceeding must disregard any error of defect in the proceeding which does not affect the substantial rights of the parties."

The appellant has not pleaded or admitted that a partnership existed, nor has he plead that a partnership existed and was terminated by the act of Doan, nevertheless he is attempting to raise this point in the Appellate Court. If he had plead and set up that the partnership was terminated, the result would have been the same, and this Court will not reverse a judgment when it can be seen from the evidence that the result will be the same and that the judgment as entered is just.

Upon appellant's own showing it is made to appear that instead of appellant being injured by the decree entered he is benefited, for it appears that Doan has commingled the assets and instead of presenting a full and fair disclosure of his dealings he has mystified, and his transactions under such circumstances all the assets and profits belong to Dyer.

Lightner Mining Company vs. Lane, 161 Cal., 689.

In addition to the testimony set forth showing that the relation between Dyer and Doan was not changed, the following is offered:

The first payment of Louisiana property was made

on the 10th day of April, 1919, and at this time Doan says that he had changed his relations with Dyer (Tr., p. 331); yet on the 15th of May, 1919, Doan wires from Shreveport to Dyer at Ft. Worth, "Better go to Burke tonight sell both pieces soon as possible, also Eastland acreage. Can use the money here to better advantage. Things look fine" (Tr., p. 225). Again, on May 16, 1919, Doan wires Dyer, "We have bought several pieces. Will tell you details later this week. Like Shreveport best place to do business" (Tr., pp. 225, 226).

On May 18, 1919, Doan wires Dyer from Shreveport, "We have made big purchases here of wonderful properties and need the money" (Tr., p. 226).

On June 11, 1919, from San Francisco, Doan wired Dyer, "Leaving for Shreveport Sunday night. Have arranged everything satisfactorily. Glad to hear good news" (Tr., p. 227). This telegram referred to the Giffin well in Louisiana (Dyer's Testimony, Tr., p. 306).

On June 17, 1919, Doan wires from Shreveport to Dyer, "Giffin well completed. Looks fine. Hundred barrels. Everything in all fields looks encouraging" (Tr., p. 228).

On June 24, 1919, Doan wires from Shreveport to Dyer, "That well came in a big gasser. No oil yet. Don't look good" (Tr., p. 230).

On June 25, 1919, Doan wired from Shreveport to

Dyer, "Titus and I have bought 80 acres of good stuff" (Tr., p. 231).

On July 7, 1919, Doan wired from Shreveport to Dyer, "Giffin well pumping over one hundred barrels. Hard cash offered for twenty-five thousand for Bull Bayou forty. We are putting up rig there now. Also drilling the second well on Giffin lease in the morning . . . Everything fine here" (Tr., p. 231).

On July 18, 1919, from Shreveport, Doan wired Dyer at San Francisco as follows: "Drilling at Bull Bayou big well just in near southeast corner of Pine Island lease which absolutely proves all of it. . . . Come soon as possible" (Tr., p. 234).

And this after telling Dyer to keep out of Louisiana.

At pages 233, 235, 236, 241, 243, 244, 237, 238, 246, 247, 248 and 239 of the Transcript are similar letters and telegrams wherein Doan is reporting to Dyer the inner workings of the Doan Oil Company, just as one partner would report to another partner and just as one who was not a partner would not report to an outsider.

It is inconceivable Mr. Doan would have written these letters to Mr. Dyer, as he said he did, had he severed relations with him and told him to keep out of Louisiana and stay in Texas, knowing, as he said he knew, that Texas was a deep country and not a good place to venture, and knowing, as he did, that he had appropriated all of the assets of their venture, and all

the labors of Dyer, together with the good will of the undertakings.

DYER'S CONNECTION WITH AMERICAN OIL AND
ENGINEERING COMPANY

When Dyer became the president of the North Texas Supply Company, there existed an agreement between the Lucey Manufacturing Company and a competing company that the Lucey Company would keep out of the Wichita Falls territory. This agreement would terminate January 1, 1920. Then the Lucey Company would take over the North Texas Supply Company. Dyer did not become actively connected with the American Oil and Engineering Company until January 1, 1920, and then only with the consent of Mr. Doan.

Counsel in his Brief charges that Mr. Dyer did not carry out his contract with the North Texas Supply Company; that he connected himself with the American Oil and Engineering Company; that Doan had forbidden Dyer to come to Louisiana and that Doan had refused to do any more business in Texas. All these charges are based upon the testimony of Mr. Doan to the same effect.

On the 25th day of October, 1919, Mr. Doan wrote a letter from Shreveport, La., that would seem to negative all these contentions of counsel and of Mr. Doan, and makes it appear that the testimony of Mr.

Doan is a product of his imagination. In this letter Doan says:

" . . . You must be absolutely sure that there is no break about it. I am sure, however, you will find something. And I would not tackle a wildcat. Raymond does not know anything about it.

I have written Titus about the American Oil & Engineering Co. and a little later on after our wells on Section 6 are completed I may take it up with them. But I don't want you under any circumstances to mention it until we are ready to talk business, because I will have to go over the matter fully with Titus before I can offer anything."

This letter demonstrates that Doan knew that Dyer was connected with the American Company and tells him not to mention until he sees Titus. It appears from this letter that Dyer is in some way representing that company.

The letter continues:

"Regarding the cancellation of your order with Carr. The only thing I have to say is to stand pat. I am through taking any of his bull. I will go to the bat with him at any time. And I suggest that you keep on selling rigs wherever you can—Shreveport or any other place.

THEY HAVE VIOLATED EVERY AGREEMENT WITH THE NORTH TEXAS SUPPLY COMPANY and you ARE AT LIBERTY TO DO AS YOU PLEASE. . . .

I hope you will be able to find something for your California crowd, but I realize that it is no easy thing to do. You will find something, however, and can build up a big company" (Tr., p. 246).

Doan testified that he would not carry out his agreement to turn over Doan Oil Company stock to Dyer because he had not carried out his agreement with the North Texas Supply Company, and here in this letter he says that the Lucey Company has violated every agreement. That would absolve Dyer.

Even if Dyer was connected with the American Company, the connection was not adverse to the Texas Company. More, right in this letter, Dyer has the approval of Doan.

At page 32 of the Brief, counsel states that Doan agreed to carry Dyer in the Doan Oil Company to the extent of 50,000 shares worth probably \$8 to \$10 per share and originally costing \$1 per share because Doan's son was interested to the extent of \$5,000 in the North Texas Supply Company. This does not sound plausible.

A PARTNERSHIP RELATING TO LOUISIANA

Under this heading at page 42, counsel claims that in the absence of an agreement with Titus and Lucey, Dyer cannot become a partner with them in the Doan Oil Company. But the Doan Oil Company is a corporation, and Dyer can certainly hold stock in it. But assuming that it was once a partnership, there is no necessity to hold that Dyer could not recover any of the assets because he could not become a partner. Doan would still be the partner, and a court of equity would impress a trust upon Mr. Doan for the benefit of his partner, Mr. Dyer. Dyer would not

become a partner, the trust would be impressed upon Doan, and if it became necessary the partnership would be dissolved.

In 30 Cyc. 605, the text is as follows:

"The legal power of a partner to make a legal transfer of his interest to a third person is unquestioned. The transferee, however, does not become a tenant in common with the other partners in any specific goods, but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including debts due from the firm to a partner. Such purchase does not make the buyer a partner in the firm, without the concurrence of all the partners, either given expressly or implied from conduct."

The complainant is not endeavoring to prove that he is a partner with Lucey and Titus, but merely that he is a partner with Doan, and that Doan holds stock in the Doan Oil Company in trust for Dyer. Titus and Lucey are not parties to the suit at bar.

At pages 44 and 45 of the Brief, counsel reviews the testimony of witnesses that they had heard Doan say that Dyer was associated with him in the Louisiana properties. Counsel says that it is impossible to reconcile the testimony of Mr. Berry with the uncontradicted evidence of Doan corroborated and supported by the exhibits to which we have last referred. On the contrary, the testimony of Mr. Berry is corroborated by all of these exhibits and by the letters

and telegrams of Mr. Doan. The testimony of Mr. Doan is contradicted by his own letters and telegrams, as appears from this Brief.

AUTHORITIES CITED BY APPELLANT

In *Wheeler vs. Farmer*, 38 Cal., 203, Wheeler was the owner of a patent, and agreed with Farmer that he should sell the article and pay over to Wheeler one-half and retain one-half. The Court held that this was not a partnership; there was nothing joint about it. They were not associated in business. The business was conducted entirely by Farmer. It has no application to the case at bar. In the case at bar there was a common fund and a division of profits.

The *Wheeler* case was the ordinary commercial transaction where a vendor receives goods and sells them at his own expense and turns back a certain sum.

Coward vs. Clanton, 122 Cal., 451, is a very strong case against the appellant. The Court held that there was no partnership where a real estate agent sold lands for an owner and was to pay all expenses out of the proceeds and then divide the profits above a certain sum, for the reason that the owner and the broker were not associated together in business; but the Court also held that nevertheless the broker was entitled to an accounting of the profits, even though there was no partnership. So in the case at bar there must be an accounting whether there is a partnership or not. This case virtually throws appellant out of Court.

As was said in this case the question is not, was there a partnership? but is, is the complainant entitled to an accounting?

Jones vs. Title Guaranty etc. Co., 178 Cal., 378, as to what constitutes a partnership, cites and decides the same principle as does *Coward vs. Colton*.

Reynolds vs. Jackson, 25 Cal. App., 490, is more strongly against the appellant than is *Coward vs. Clanton*, for it decides practically the same questions and in addition adds that the Appellate Court will not review testimony where testimony given in the Court below is *viva voce* and conflicting. At page 496 the Court said:

“We are called upon to perform a duty which, in the very nature of things, a reviewing Court cannot well be expected satisfactorily to discharge: viz., weighing and so determining the credit to be accorded testimony given *viva voce* before another tribunal.”

The rest of the cases cited by counsel are similar to the ones we have here reviewed, and for that reason time and space will not be taken to review them.

At page 53 of his Brief, counsel speaks of Dyer's conduct of the North Texas Supply Company as a total failure of consideration.

We have called attention to the fact that Captain Lucey, the president of the parent company and the one most interested in the success of this company, was well satisfied with the conduct of Mr. Dyer, and ordered that the bonus stock be issued to him; this

stock was never issued to him, for the reason that Mr. Doan silently and secretly presented a protest (Tr., p. 257).

Here is the record as it appears from the transcript and referred to in this Brief.

First, Carr refuses to furnish the supplies to Dyer; second, Doan writes Dyer that the Lucey Company has violated all its agreements and you are at liberty to do as you please (Tr., 246); third, Lucey is well satisfied and orders the bonus stock issued to Dyer and says that he has done better than he expected; and last, Doan puts in a protest and stops the issuance of the stock (Tr., p. 257). Counsel calls this a want of consideration, and asks this Court to reverse the lower Court that heard Mr. Doan testify to these matters. We ask the Court to apply the rule laid down in the case cited by counsel in his Brief: to wit, *Reynolds vs. Jackson*, 25 Cal. App., 490, 496.

At page 61, counsel states that Doan did not profit a single dollar in any of Dyer's activities during the time that Doan was engaged in developing the Louisiana holdings.

It requires money to operate in an old field, as will be seen from reading the letter written by Doan to Dyer, while Doan was in the Balboa building. "We must have \$100,000." Now, Doan had all this money in the Doan Oil Company, and he even had Dyer's automobile. Under the circumstances Dyer did remarkably well.

STOCK OFFERED STOCKHOLDERS

In dealing with this stock, Doan should have exercised the highest good faith, and if he had no money with which to purchase the stock he should have called the attention of Mr. Dyer to the fact that the stock was offered (*Dennis vs. Gordon*, 163 Cal., 427). This would have enabled Mr. Dyer either to have borrowed money to take it up or to have sold it on the market at its value—\$8 or \$10, or whatever the market was. If this stock was issued to Gatch and Morris to pay an obligation of the partnership, it should have been issued at the market price, and the personal stock of Doan should not have been taken to satisfy a company obligation. Treasury stock should have been issued.

Counsel states that the stock was issued subsequent to the termination of the partnership. But it was not issued subsequent to the termination of the trust relation that still existed.

DISCRETION

Equity will not allow one partner to exercise a discretion that disposes of stock worth \$8 or \$10 a share for \$1 per share. At any rate, the matter should have been called to the attention of Dyer (*Dennis vs. Gordon, supra*).

APPELLANT IS ENTITLED TO INTEREST UPON MONEYS
ADVANCED

The Court allowed each interest from the day of termination of the partnership, March 22, 1920, to

the day his report was filed, September 19, 1921. This was in accordance with the rule that capital furnished bears no interest (Cal. C. C., Sec. 2403), and no interest is allowed. Interest is allowed from the date of termination upon the theory that all balances should be settled upon that day.

Reply to contention of counsel at page 78 that the allegations of the complaint should control, we say that the allegations of the complaint are denied by the answer, and a complaint is not in such a case evidence, and the evidence will control. This case does not come within the exception. The letters of Doan show that they were to raise \$100,000, and there is evidence that Titus furnished \$40,000 of this. If Titus furnished money for the partnership he received his compensation from his shares of stock. Doan should not have interest on moneys advanced by Titus. The trouble with the whole matter is that Mr. Doan refused to file a full statement of where the moneys came from. Counsel is now contending for interest upon these funds furnished by Titus and from moneys perhaps furnished by Lucey. This cannot be done. And no case will bear him out in this contention. There is no testimony that Mr. Dyer was to pay \$50,000 to Mr. Doan as a personal loan from Mr. Doan. There is no testimony where this \$50,000 was to go to.

Mr. Doan should have made a full disclosure of these matters.

In conclusion we urge upon the Court the following facts:

First, the letters written by Doan to Dyer establish a partnership relation; and these letters become a written contract, and this contract cannot be varied by the oral testimony of Mr. Doan, nor can they be varied by his later wirings or telegrams. This relation being established between the parties, a confidential relation is established and it then becomes the duty of Doan to act in the highest good faith toward Dyer. The burden of proof is cast upon Doan to establish that all his transaction concerning the partnership property and all partnership relations have been fair and just.

Second, Mr. Doan has not made a full and fair disclosure of all his transactions concerning the property of this partnership, and it appears from the testimony that his oral testimony varies from his writing and telegrams. In these respects he has failed to measure up to the full demand of the law, and all presumptions are by the law thrown against Mr. Doan. And the presumption asserts itself that the transactions are as contended for by the complainant and in accordance with the findings of the Court.

Third, that it is immaterial whether or not the relation between the parties is a partnership or a joint venture, as the only question is, is the complainant entitled to an accounting, and is the defendant a trustee

of the complainant with certain funds in his possession?

We respectfully submit that the judgment as entered by the Court below is just and in accordance with the law and equity and is fully sustained by the evidence and should not be reversed on any mere technicality.

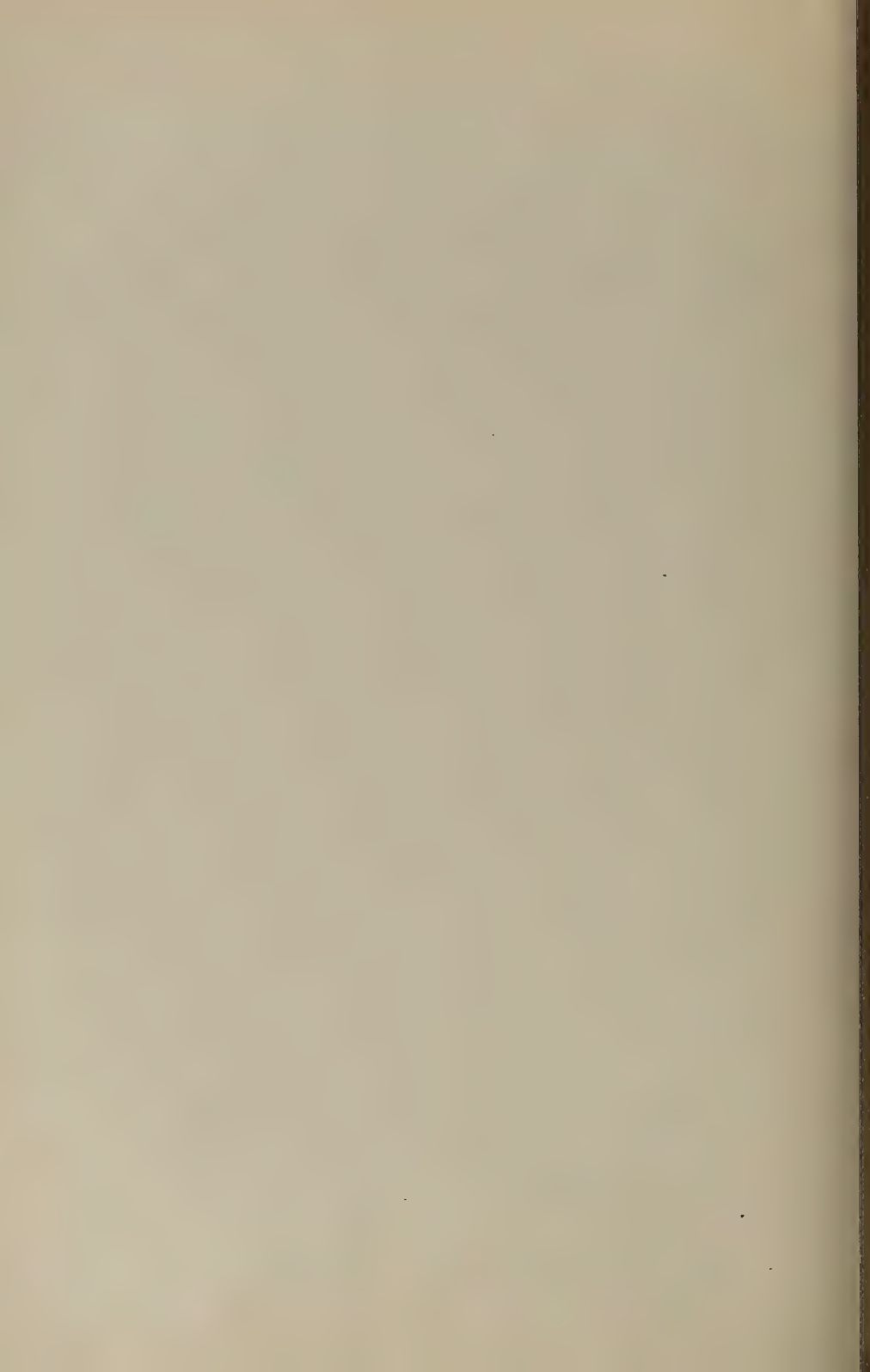
Respectfully submitted,

W. H. METSON,

R. G. HUDSON,

Solicitors and Attorneys for Appellee.

Dated, October 23, 1922.



No. 3915

HUSTON

United States Circuit Court of Appeals

In and for the Ninth Judicial District.

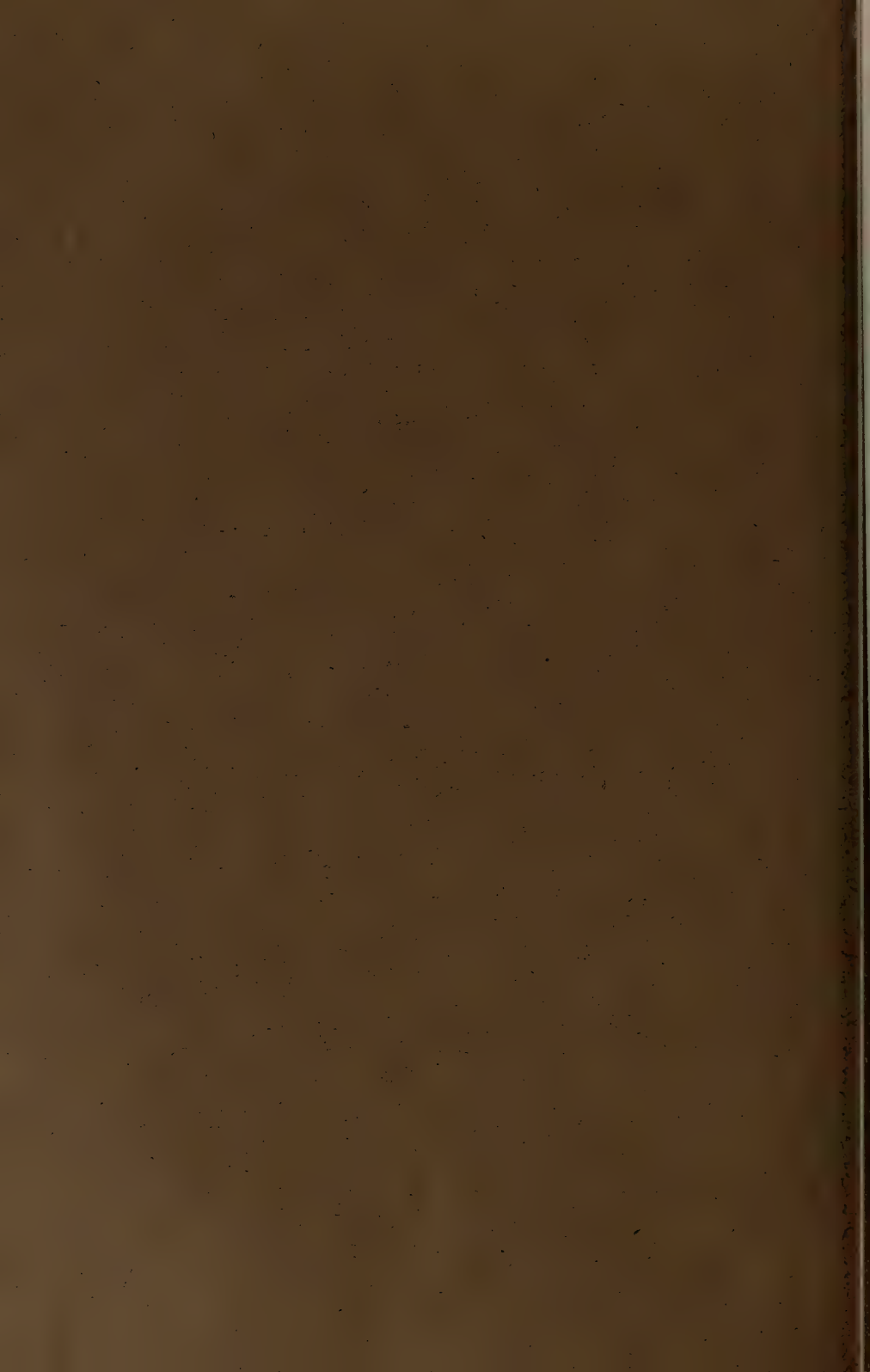
L. E. DOAN,	}
<i>Appellant,</i>	
VS.	
B. T. DYER,	}
<i>Appellee.</i>	

ORAL ARGUMENT OF C. W. DURBROW ON
BEHALF OF APPELLANT.

FILED

NOV 22 1922

F. D. MONCKTON,
CLERK.



No. 3915

IN THE

United States Circuit Court of Appeals

In and for the Ninth Judicial District

L. E. DOAN,	}
<i>Appellant,</i>	
VS.	
B. T. DYER,	
<i>Appellee.</i>	}

ORAL ARGUMENT OF C. W. DURBROW ON BEHALF OF APPELLANT.

Mr. DURBROW. May it please the Court: This case involves the question as to whether a partnership ever existed between the parties to the proceeding. That is the matter of primary importance. As a matter of secondary importance, we are called upon to argue some questions relating to an accounting, for the reason that the trial court held that the partnership did exist, and the matter was referred to a special master to take an accounting, and exceptions were taken by both parties to the accounting reported by the master.

It will be necessary for me, in the first instance, if you please, to call your Honors' attention to

the allegations contained in the complaint, because, as we proceed, we will find that it will be necessary to give particular reference to many of these allegations. I do not propose to read the complaint, but will direct the Court's attention to the salient features.

It is alleged that a partnership was formed for the general purpose of carrying on business together in operating oil bearing lands, and interests therein.

It is alleged in paragraph V of the complaint, and I choose, if you please, to read this entire paragraph:

“That said agreement of partnership was wholly an oral one, and its terms are and were not reduced to writing.”

I then next direct your Honors' attention to paragraph VII of the complaint, in which it is alleged that the parties would give their attendance and devote their entire time and attention to the business thereof, and to the furtherance and advancement of the partnership business and affairs to their mutual benefit and advantage. And that said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business.

It is alleged in the complaint that the defendant, in violation of the terms of the claimed partnership agreement, did not devote his entire time and at-

tention to the affairs of the partnership, but, on the other hand, devoted his entire time and attention to his personal business and affairs, to the detriment of said copartnership business, although it is alleged that the plaintiff at all times complied with the agreement, so far as he was concerned.

Now, we intend to show, if you please, as a brief outline of this argument, that no contract, oral or written, was ever executed between the parties relating to any partnership whatsoever.

We shall further argue that if it could possibly be held, under the facts as interpreted by the well-defined principles of law, that a partnership at any time did exist, that by mutual consent that partnership was terminated on the 30th day of May, 1919. That on this date there was an entirely new arrangement made between the parties, whatever their relations may have been prior to that time. We will direct the Court's attention to the evidence which shows that at this time any relations theretofore existing between the parties were entirely changed and that the appellant engaged in a separate and independent venture in Louisiana and agreed to carry appellee for an undefined interest therein, provided appellee would devote his entire time and attention to managing an independent business in Texas; that the appellee failed entirely to fulfill his obligations; that there is therefore a failure of consideration, a want of mutuality; and that as appellee had merely a contingent as

distinguished from a vested interest he is not entitled to recover.

Now, in the first instance, it becomes necessary to determine whether a partnership has been proven. We desire to show that even though we refer exclusively and entirely to the testimony of plaintiff himself, the appellee here, and take his evidence at its face value and give it full weight, that it is not sufficient to establish a partnership relation. And I might say parenthetically that I do not, although I will refer very largely to the testimony of the plaintiff in this case, wish to have the impression created that we do not place great dependence upon the testimony of the defendant in the case, which in a large measure contradicts and conflicts with the testimony given by the plaintiff. But, I propose, if your Honors please, to refer particularly, and almost exclusively, to the testimony of the plaintiff, to show that, under his own sworn testimony, there never was a partnership relation existing between the parties to the controversy.

At pages 109 and 110 of the direct examination, the plaintiff undertook to relate very minutely in response to questions put to him by counsel what the terms of this partnership were. I want to refer to page 120 of the transcript, where upon cross-examination he reiterated what he said upon his direct examination, and stated what were the sole and exclusive terms of the partnership agreement, and I am going to read from the transcript

very briefly, if your Honors please, because it is covered in a few words.

Mr. Dyer testified:

“The sum of all that was said by Doan at that time”—that was the time in August, 1918, when the partnership was supposed to be formed— “in response to my suggestion that we go to Texas”— please bear in mind he was relating entirely to Texas, at that time, and not to any other place— “was that I stated to Doan, after I advised him what investigations I had made, ‘I am going back anyway Larry, and I want you to come back with me,’ and Doan’s reply was, ‘I will come back with you and follow you up and hit the ball and back you up and we will divide the profits.’ That was the sum of our many conversations.”

On cross-examination he further testified, upon the same page:

“What I said upon direct examination is all the arrangement that I ever had or ever made with Doan at any time with reference to a partnership between us. I did not have any other arrangement or understanding with Doan, except as I have testified.”

And that testimony was that he was going back to Texas in any event, that he asked Doan to go back there to Texas with him, and Doan said for him to go back, and that he would follow him up and hit the ball, and that they would divide the profits.

Now, upon the trial in the lower Court, great stress was laid upon this testimony, and particularly upon that testimony so far as it related to the

division of the profits, and it was argued that that was the terms of a complete contract, and that because there was to be a division of the profits that the partnership relation was established then and there at that time. I want to cite to your Honors and read very briefly an excerpt from a decision in a case cited by the appellee in its brief filed in this Court, holding that any such language as was employed by the parties, or any such agreement as plaintiff claims was made, does not constitute a partnership. The Court says, in *Westcott v. Gilman*, 170 Cal. 568:

“Appellant last contends that there may be a division of profits as a basis of fixing compensation, apart from and independent of a partnership. This, of course, is perfectly true. A division of the profits amongst employees is not an unusual thing in modern business. The employees receive a fixed compensation by way of wages or salary, and, in addition thereto, and as an inducement to more efficient service, are given a certain percentage of the net profits at stated intervals. This, of course, does not create a partnership. No more is a partnership created in that other large class of cases where leases of various kinds are made, the compensation to the lessor being based upon the profits which the lessee may derive from his holding. But while thus the element of profit-sharing does not alone and of itself establish a partnership, it is an essential element of every partnership, and it is an element present in this contract.”

This decision clearly states the law and is in accord with the decisions cited in appellant's brief which hold in an agreement such as this all the

essential elements of a partnership are lacking. In substance the agreement was that Dyer was going to Texas anyhow and that Doan said he would follow, back Dyer up, and divide the profits. Partnership can not be created by implication apart from the express or implied intention and there must be a community in the capital stock, profit and loss.

The authorities cited by appellee are not apposite for the reason that all, with the exception of one case cited, are concerned with the rights of third parties and the excepted case is founded upon a written contract, and the facts of the cases are generally dissimilar to those relating to the case at bar. It is unnecessary to direct the Court's attention to the fact that a different rule is to be applied where the interests of third parties are concerned than where the interests of the parties to an alleged contract of partnership are involved.

This alleged agreement does not match up to the allegations contained in the complaint to the effect that the parties had agreed to devote their entire time and attention to the partnership business and that they should furnish such sums of money as should be necessary to carry on its business. Dyer testified that this was the entire and only agreement of partnership and under the authorities cited by appellant in his brief it can not be held that such an understanding is sufficient to constitute a partnership.

Now, after that arrangement was made, these parties went to Texas. First, Dyer went to Texas,

and was followed by Doan. They had several independent transactions, and in those transactions you will find, from the testimony of the plaintiff, himself, that Doan was the "master mind", that he dictated the entire policy, and determined what property should be purchased, and determined what property should be sold, how much they should pay for these properties, how much they should sell them for. He was, as he said, the boss, and that testimony is not contradicted by Dyer. And you will find all through the transcript testimony by Dyer to the effect that whenever Doan told him to do anything he did it. And you must reach the inevitable conclusion, by virtue of these various transactions, which I cannot detail here now, that Doan was the employer, Dyer was the employee, and that Dyer was compensated for whatever service he rendered to Doan by a division of the profits whenever a transaction was completed. Doan advanced all the money in every transaction, with the exception of some small sums for attorneys fees, a very small initial payment, such as \$500, when Dyer was in Texas and Doan was back here in California, which was in each instance returned by Doan to Dyer.

The acts of the parties and the manner in which the business was conducted in Texas show conclusively that the only agreement ever made between the parties, according to the testimony of Dyer, did not create the relationship of partners between the parties. This contention is further emphasized

by the fact that from the time the partnership is alleged to have been created in August, 1918, until May, 1919, each of the parties engaged in several independent ventures, Dyer testifying at page 94 of the transcript that he had independent dealings with W. L. Leland, and at pages 118 and 119 of the transcript where he testified as to independent dealings he had with Jergins in Archer County, Texas.

We wish again to refer to the testimony of the plaintiff who testified upon cross-examination at page 121 of the transcript.

“We did not carry that land in the name of Doan & Dyer, or Dyer & Doan, and we never had any account in the name of Doan & Dyer, or Dyer & Doan. Only some of the bills around town, the garage bills, were called Dyer & Doan, or Doan & Dyer. We never had any bank account or common funds.”

He talks about a little memorandum book he kept, a pitiful attempt to prove that there were partnership accounts; he could not produce it when asked to do so.

“We never used any stationery upon which both names of Doan and Dyer appeared. I had a power of attorney from Doan, which was given to me shortly after the Bosque leases were issued. Those leases were sold in the name of Doan by virtue of that power of attorney. I was acting as his attorney in fact.”

Never throughout this entire period was there a single transaction conducted in the name of the partnership of Dyer & Doan or Doan & Dyer; there

never was a community of capital, there never was a community of interest, there never was anything done by either of these parties in a partnership or any firm name, but in each instance each one of these deals was handled as I have outlined, by Doan dictating the policy and dividing the profits with Dyer as his compensation.

Now, in the light of the authorities which are cited in appellant's brief, the Court must hold that under the facts as they have been briefly outlined no partnership relation ever existed between the parties and that in order to create such a relationship there must be a community in the capital stock, there must be a community in interest, there must be an understanding that the parties will assume losses as well as divide profits. Doan took and assumed the entire risk in each one of these transactions. In one instance, Dyer made the initial payment of \$10,000, but he testifies in the transcript, and it is not disputed, that that \$10,000 was given him by Doan, and Doan paid the balance of that purchase price. This is all we shall have to say with respect to the oral contract.

We were surprised upon receiving appellee's brief filed in this Court to learn for the first time that in the face of the allegations contained in the complaint to the effect that the contract of partnership was wholly oral, which was held to be the fact by his Honor, Judge Rudkin, and in face of the decree prepared by counsel for appellee, that the agreement was evidenced entirely by an oral con-

tract, to find appellee at this late date undertaking to argue that the contract of partnership was evidenced by writing. Counsel for appellee predicated his argument to this effect upon certain letters passing between the parties and I intend to argue to this Court, just as I did in the case of the supposed oral contract, that if you take the testimony of Dyer at its full face value and assume that the contract is evidenced by these letters, that there is nevertheless nothing contained in all or any of these three letters which would justify the conclusion that the partnership relationship ever existed between the parties.

I want to refer, if you please, first to a statement made by counsel for appellee in his brief. All the way through the brief you will find them speaking about this "letter contract", and the contract having been established by reason of this correspondence that passed from Doan to Dyer, and on page 92, I think it is, of the brief, particularly the last page, where counsel sums up his case, he says:

"In conclusion, we urge upon the Court the following facts:

First, the letters written by Doan to Dyer establish a partnership relation; and these letters become a written contract, and this contract cannot be varied by the oral testimony of Mr. Doan, nor can it be varied by his later wirings or telegrams."

Now, I have not time to refer to that letter, except in a very general way; it is on page 111 of the transcript, I believe, but in that letter addressed

by Doan to Dyer, on August 9, 1918, he speaks about it taking big money to engage in the oil business. He says:

“I have been thinking hard about the whole thing, and I have tried to make up my mind what is the best way to handle the situation, and I have about come to the conclusion that our first hunch was the best.”

He talks about things moving fast in the oil business. He says:

“Personally, I cannot afford to take a chance. We must first raise at least \$100,000 before we can expect to do any business. It is all right to look the field over and get a line on propositions, but we must have the money.”

Then he says,—this is very significant:

“If they carry us”—the persons who were supposed to raise the money—“for 25 per cent and expenses, that is as much as we can expect.”

And then he says:

“I fully appreciate all you are doing. The information you are getting will be valuable.”

Now, there is nothing in that letter, not one syllable in that letter, about any partnership. There is not one syllable in that letter about the division of any profits. There is nothing in that letter with reference to the assumption of any losses. There is nothing in that letter, with the exception of these expectations expressed by Doan, and the fact stated that if they can raise \$100,000 that the parties who

carried them would not allow them more than 25 per cent of the profits.

Now, if you please, refer to page 218 of the transcript, and you will find there a second letter written by Doan to Dyer, but not in August, the time the contract was supposed to be executed or consummated, but on February 15, 1919, several months later, and in that letter there are certain references to some oil properties, but there is nothing there in that letter to the effect that there shall be a division of profits; there are none of the essential elements of a partnership found in that letter. And then they refer, if you please, to a telegram that was sent by a third party, Captain Lucey, to Dyer, the plaintiff in the case, prior to the time either of these letters were written, in which he suggests that the parties ought to get together and come down there to Texas.

Now their claim that there was a written contract is based on these three letters, and they argue at page 20 of their brief that if this contract is binding that these letters are conclusive as to Doan. Well, if they are conclusive as to Doan they are conclusive as to Dyer. I might end this argument here, so far as these letters are concerned, because I say there is no writing anywhere in the transcript to show a written acceptance of any offer that may possibly be found in any of these letters, or that these letters were the acceptance of any offer made by Dyer; and, of course, according to the rule that is invoked by counsel for the appellee, it will be necessary

for the contract to be evidenced completely by writing, but I am not going to rest upon any such elementary proposition, because I want this Court to understand clearly and distinctly that notwithstanding they claim this is the contract, and that all they can expect is 25 per cent of the profits, that you will find Dyer testifying at page 122 of the transcript that when they had a deal later on in Oklahoma, or in Texas, in which Mr. Doan had invested his money that:

“While Doan did not tell me that I was going to have a half interest in the property, nevertheless I expected a half interest in that venture.”

Now, the money was contributed by Titus, one-half by him, one-half by Doan, and yet Dyer, in the face of this “letter contract”, if it were a contract, which would only entitle him to 12½ per cent, claimed 50 per cent of the profits that might accrue from that deal.

They argue that Doan did not put up a cent of money but you will find that Doan advanced the funds in Texas absolutely and conclusively all the way from the beginning down to the end, with the exception of \$20,000 that was provided by Titus, and I want to ask counsel how he can suppose that Mr. Dyer is entitled to 50 per cent of the profit which might have accrued from the Texas deal, although it was apparent that he did not advance a cent, and that Titus and Doan contributed the money.

You will find, according to the testimony of Dyer on his cross-examination, that none of the essential elements of a partnership were anywhere present; you will find that different parties were interested in these different deals, Couch in the Oklahoma deal, Jergens in another deal, Titus in the deal to which I have referred, and that Doan went and obtained the money by a loan and invested the money in the ventures, he advanced whatever capital he had, and he advanced all of the money, and Dyer did nothing at all except as he was directed by Doan.

But the agreement, oral or written whatever it may be, claimed by appellee to have been made in August, 1918, and relating exclusively to Texas and to which we have referred as extending from August, 1918, to May, 1919, does not represent the important or crucial point of this case, because in May, 1919, the parties entered into an entirely different arrangement. Bear in mind, if you please, that the allegations of the complaint are that this partnership was formed for the sole and exclusive purpose of engaging in the business of acquiring, holding, and selling oil lands. Now, I am going to take two different views of this arrangement that was made in May, 1919. I am going to first refer to the testimony of Mr. Dyer, corroborated by his letters, and corroborated by the testimony of Mr. Carr. And I am going to show, according to that testimony, that there was a complete rescission or termination of any partnership agreement that might have been made, and I do not concede for

an instant that there was a partnership arrangement, but assuming, if you please, that their partnership existed up until May 30, 1919, I am going to argue that any such arrangement was cancelled and rescinded by mutual consent, as parties might do under the provisions of section 2449 and subdivision 2 of section 2450 of the Civil Code of this State.

Now, what happened at that time? According to the testimony of Mr. Doan, in May, 1919, he told Dyer that he had concluded that he would not continue operations in Texas, that the territory was deep, there was too great a risk attendant upon that sort of venture, that he had formed an arrangement with Mr. Titus and Mr. Lucey, and that Mr. Titus and Mr. Lucey were going to Louisiana and engage in the oil business at that point, and he said: "Our arrangements from here on will be on an entirely different basis", Captain Lucey proposed to Mr. Dyer that he become president of the North Texas Supply Company, a subsidiary of the J. F. Lucey Company, that he devote his entire time and attention to that business at Wichita Falls, Texas, at a salary of \$500 a month, which would carry with it the conditional issuance to Dyer of some bonus stock of the Supply Company, Exhibit H, introduced by the defendant, will show that Mr. Dyer had in his own handwriting outlined the formation and operation of that corporation, that he subscribed to some capital stock of that corporation, and the uncontradicted

evidence shows that he became the president of the North Texas Supply Company, that he engaged in that venture at Wichita Falls, stayed there for a while, subsequently went to California, went to New York, made several trips to Pittsburg, wandered around the country, and in October of that year, while he was drawing a salary of \$500 a month as president of the North Texas Supply Company he engaged in a venture with the American Oil Engineering Co., of New York, at a salary of \$1000 a month, which was later increased to \$1250 a month. That during this time he claimed the partnership continued, after May 30, 1919, Mr. Dyer did not devote one hour's time, according to his sworn testimony, to any activities of Doan in Louisiana; he did not contribute one cent of money to any of Doan's activities in Louisiana.

I want to read to you his testimony in that particular, if your Honors' please. I quote first from page 126 of the transcript:

"I never invested one cent individually in any of these projects of Doan's"—

he did not say:

"I did not invest any money in any partnership"—

but he said:

"I never invested one cent individually in any of these projects of *Doan's*."

Now, you will see he is referring to Doan's Louisiana venture, because after the arrangement was made between Doan and Dyer in May, 1919, Mr.

Doan went to Louisiana, and the uncontradicted evidence shows that he devoted his entire time to his Louisiana properties. In fact, it is complained by counsel in their brief that he devoted his entire time to the Louisiana venture in violation of his agreement with Dyer. The fact is that Doan not only devoted his entire time and attention to that business in Louisiana, but Doan invested \$100,000 of his own money in the Louisiana venture, and Dyer testified:

“I never invested one cent individually in any of these projects of *Doan's*. I don't know how much money Doan invested in Louisiana, except that he told me that he had put in \$100,000. I don't know how much he invested in Texas.”

And again, at pages 122 and 123, you will find that Dyer not only did not invest any money in that venture, but he did not at any time spend an hour in that state. He said:

“What Doan told me about Louisiana property is practically all I know”,

and yet, in spite of the fact that he never went to Louisiana, he never spent an hour there, never contributed a cent to that venture, but on the other hand was acting as president of the North Texas Supply Co., and also as an employee of the American Oil Engineering Company, at a salary of about \$1000 a month, he nevertheless claims that the partnership continued after that arrangement had been made with Doan in May, 1919.

As I have already suggested, Doan testified that his venture in Louisiana was going to be on an entirely different basis. By reason of the fact that no term was fixed in the claimed partnership agreements Doan had the right to terminate any partnership which existed at will. Not only does his testimony bear out our contention that any partnership relationship was terminated by him in May, 1919, but the acts of the parties which have been briefly related show that he did so. But this matter is set at rest by a letter addressed by Doan from Shreveport, La. to Dyer who was then, I believe, in Texas. This letter was dated October 12, 1919, and by referring to page 130 of the transcript it will be found that Doan stated in this letter:

“While there is a big boom on here, I have not seen anything that I could recommend to your crowd, that we cannot handle ourselves.”

He was speaking about Captain Lucey, and Mr. Titus, and their venture.

“And, as I said before, I cannot afford to mix up with you on any outside deals in Louisiana.”

There is no question about this letter. It was introduced by the plaintiff in the Court below, and that corroborates the testimony of Mr. Doan that he would not continue any arrangement that he had with Mr. Dyer, or it would be on an entirely different basis.

In fact, Mr. Louis Titus, of this city, testified, at page 202 of the transcript, that Mr. Dyer had

told him in August of 1919 that Mr. Doan had refused to permit Dyer to go to Louisiana. Subsequent to May, 1919, as we have already stated, the evidence shows conclusively that Dyer never invested one cent in Louisiana, did not even know what was going on there except what Doan told him. During this time he made arrangements with the American Oil Engineering Company to enter their employ; generally managed their business and spent considerable of his time in over-seeing that office and conducting the office which he had established at Fort Worth, Texas. After he had entered their employ he built a pipe line for them and handled some drilling business for them up at Wichita Falls; further than that, he established an office for them at Fort Worth, Texas, and he said that his time was engaged in overseeing the business in that office of the American Oil Engineering Co. at Fort Worth, and he said that in consideration they paid him a salary of \$1000 a month, increased it to \$1250, and he said in addition to that they counted him in, to use his language, as one of their family, and they were going to give him bonus stock, which was to be held in escrow.

Now, I won't take time to refer to other matters which shed some light on this matter, but I do want to impress this upon the Court, that I have been relating now the facts as they existed, where they are not disputed, except in so far as the arrangements which were made at Fort Worth in May, 1919, are concerned. Doan testified that he

agreed to carry Dyer for a contingent interest in the Louisiana venture, but he would expect Dyer to go and keep faith with Captain Lucey and handle the business of the North Texas Supply Company and form this drilling company, and engage in that business at Wichita Falls and stay there and remain there. Dyer, on the other hand, says that he did not have any such arrangement with Doan; that Doan was to continue on with the partnership. But now, what did he say in connection with that? I want to refer you again to his testimony, to the testimony of the plaintiff in this case, at page 117, and this is what he says the arrangement was that he made with Doan. He said:

“Doan told me about when the Doan Oil Company was organized. After Titus had been there in company with Doan and Lucey, he came back to the Fort Worth Club, which was our headquarters, and said”—

just listen to this testimony, now, out of the mouth of the plaintiff in this case. He said:

“We have arranged to make a \$300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece.”

Now, mind you, he does not say that the partnership has agreed to take one-third. He says that Doan told him:

“We have arranged to make a \$300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece.”

Now, that corroborates and bears out the testimony of Doan that he undertook to carry Dyer for a contingent interest. You will find that all through this testimony, and I refer particularly to Exhibits C and F, letters written by Dyer to Doan, that Dyer consistently and persistently claimed one-sixth interest in the Doan Oil Company as his individual interest. He never at any time or place at all claimed that he had an interest in any partnership which owned the Doan Oil Company, until it came to the time that counsel for appellee wrote the brief in this case. All through the testimony you will find he claims this individual interest, and he says at page 119 of the transcript:

“I have never received the one-sixth interest in the Doan Oil Company. I demanded it many times.”

In the letters to which I referred, you see he was referring to “my interest in the Doan Oil Company”. So, I say, that so far as any partnership arrangement after May, 1919, is concerned, it is disproved by the testimony of Mr. Doan, Mr. Titus, Mr. Carr, and by the testimony of the plaintiff, himself. It is inconceivable that this man would have been constantly claiming a one-sixth undivided interest in a corporation which had been formed by these other parties who were not parties to the agreement between Doan and Dyer unless the fact was, as testified by Doan, that Doan was carrying Dyer for a contingent interest in Doan’s Louisiana venture and not as a partner within the terms of

the partnership sought to be proved by Dyer orally and not within the terms of the partnership sought to be proved by his counsel by means of the letters upon which counsel relies. Dyer did not consider that he was a partner. This is shown by his acts. He was engaged in the business of managing the North Texas Supply Company, a supply business; he was engaged, as I have suggested, as an employee of the American Oil Engineering Company all during this time, receiving a salary from these two companies. I am in error. He did not receive a salary from the American Oil Engineering Company until October of that year, or November of that year, but the fact remains that while Doan had invested \$100,000 of his own money in Louisiana and devoted his entire time to that territory, that Dyer had never, according to his own testimony, invested one cent, and he had never spent an hour in that territory; he did not do anything in connection with Doan's Louisiana venture. He was getting money on the outside, and, according to his own testimony, when he was asked what he did with that money, whether he ever tried to make a contribution to the partnership from money he testified he could borrow:

“No, I spent my money, I dissipated my money in living.”

Those are the facts, and it is inconceivable that it can be held that under such facts the parties bore the relationship of partners.

Counsel for appellee argued before the Trial Court and has argued in his brief filed in this Court that the many letters introduced by plaintiff in the Court below prove that a partnership existed. I ask counsel to show in any one of these letters the mention of the word "partner", the mention of the word "partnership", the definition of any of the interests of the partners, a reference to any common stock or capital stock, a reference to any profits that they should receive, or any losses that they would sustain.

Now all of these letters are easily explainable when consideration is given to the fact, as was suggested by counsel for appellee in his brief, of the "long-time friendship between Doan and Dyer". This friendship is proved by the evidence which shows without conflict that Doan had loaned Dyer as much as \$12,000, had established credit for him at San Francisco and Oakland banks, and had carried him along and endeavored to make a man of him. These letters were written by one friend to another Doan endeavoring to keep Dyer advised of the progress of his Louisiana venture, Dyer being naturally interested because, as he himself testified, Doan was carrying him for a one-sixth interest in Doan's Louisiana investment.

In reading Doan's letters you will find him importuning Dyer constantly to do better, to go straight, to make a man of himself and attend to business, and to quit chasing rainbows, as he says. And you will find that these letters all relate to

activities in which Doan was concerned, and speak of the activities of Dyer, but not one of these letters has any reference to any partnership, or any of the elements essential to create a partnership; and while counsel undertakes to make a great deal of the fact that he employs "we" and "our" in these letters, if these letters are reviewed you will find that when he speaks of "we" and "our" he is referring to Titus and Lucey, with whom he was associated in his Louisiana venture.

Now, time is passing very quickly, but I wish, if your Honors please, to refer to page 86 of counsel's brief, in which he says,

"The complainant is not endeavoring to prove that he is a partner with Lucey and Titus, but merely that he is a partner with Doan, and that Doan holds stock in the Doan Oil Company in trust for Dyer. Titus and Lucey are not parties to the suit at bar."

I want, if you please, to just have the court, when they come to consider this case, refer to the authorities cited by appellee in their brief, and I want the Court to examine these authorities and then apply this test. It is a simple test and a conclusive test. If under these authorities Titus and Lucey were not partners with Doan and Dyer, when they had a common fund, when they all had their interest measured by the amount of their investment, when they had agreed and did buy the property in which they were jointly interested, I want to ask how counsel is going to reconcile appellee's contention that under the facts as they related to

the relationship between Doan and Dyer it can be held that the parties to the controversy were partners. The indisputable facts show that as far as the relationship between Doan, Titus and Lucey is concerned there was a community of interest, an agreement to share the profits and loss, that they each contributed a specified amount of funds to the venture and that their interests were measured by the amount of their contribution, whereas all the essential elements of a partnership, as has been suggested, are lacking whether you consider the case here upon counsel's first theory that there was an oral agreement of partnership, or upon his later theory that the partnership was evidenced by a writing.

Why weren't Titus and Lucey made partners when Titus had a 50 per cent interest and Lucey had one-sixth interest, and Dyer and Doan, according to the testimony of Dyer, had a one-sixth interest apiece? Why wasn't that claimed as a partnership? I will tell you why that was not claimed as a partnership, because it would have been very inconvenient for this complainant to come into Court and prove a partnership relation between these parties, because it could not have been established without their consent, and if he had attempted to come into this Court and make any such proof, he would have been met and confronted by the evidence of these parties that no such partnership existed. But you will find, when you read these letters, that it means nothing more than that

he undertook, for the purpose of making a small sum of money for himself, which developed into a large sum before he got through with his accounting, that he claimed a partnership existing between Doan, that he imposed upon this life-long friendship, so characterized by his counsel, that he hoped to create a relationship which would enable him to profit by a venture in which Doan was solely and exclusively interested, in which he had invested his entire capital, and to which he had devoted his entire time. That is why they didn't enlarge the scope of this partnership and bring in these other parties.

Now, while it is claimed by Doan that he agreed to carry Dyer for a contingent interest, and while Dyer, on the other hand, says that he did not remember Doan ever agreeing to carry him for an interest, nevertheless the fact is, according to his own testimony, that he claimed a one-sixth interest, and did not put in any money, which means Doan must have carried him for that one-sixth interest, whatever it was. If his testimony is to be given any credence at all, if that be so, there must have been some consideration for Doan carrying him, because Dyer did nothing with reference to Louisiana, invested no money in Louisiana. And what was that consideration? Why, it must have been that Mr. Dyer was to fulfill his obligation that he made with Captain Lucey, and go up and manage the business of the North Texas Supply Company, but he did not manage that business, but the evidence will show, and his

own letters will show, and the letters written to him by Doan will show that he was traveling around the country aimlessly, engaged in other business, and in connection with the business of the American Oil Engineering Company. If there was any partnership it was terminated, in May, 1919, by the mutual consent of the parties, and their acts and their letters show that it was terminated. It must be held that Dyer had not a vested interest of a partner, but he had a contingent interest, and that interest for which Doan was carrying him was contingent upon him accomplishing something substantially for Doan. But when you examine the account and find that Doan invested \$100,000 and devoted his entire time to that business, and see the pitiful account submitted by Dyer, which shows not a single cent invested after May, and a pitiful \$263.50 invested before that time, you must find that there has been an entire failure of consideration, there is a want of mutuality, and that contingent interest cannot be made the subject of any decree which will give to Mr. Dyer any part of the profits which were earned by Mr. Doan.

I have occupied so much time, and I want to save a few minutes in reply, that I do not propose at this time to make any argument with reference to the accounting. There are two main questions involved. They are argued fully in the brief, one in relation to the interest, and one in relation to the second issue of stock of the Doan Oil Company, and the facts are complicated, and it would only tire the

Court if I should undertake to argue those matters at this time, and I should like to retain the additional ten minutes for reply.

Closing Argument.

Mr. DURBROW. In the very few minutes remaining, I would like to contrast the viewpoint of both parties. We have a situation which appears in this way, that according to the testimony of the complainant, himself, an oral contract was executed relating exclusively to Texas. It is conceded at page 18 of counsel's brief that the partnership was formed for the purpose of sending Dyer to Texas. The testimony of the plaintiff in the action was that the contract related exclusively to Texas. After that claimed oral contract had been executed, the parties went to Texas and engaged in these several ventures, and, as has been shown in each instance, Doan was the principal, dictated the policy, advanced the money, and Dyer was following his directions in all instances. We find that according to the terms of the claimed written contract, that Mr. Dyer claimed a 12½ per cent interest, but nevertheless claims a 50 per cent interest when it comes to a settlement on any transaction, showing that the written contract was modified by the parties at least to that extent. Their relations from August, 1918, to May, 1919, as I have suggested, are not particularly important except as it throws light

on subsequent events, for the reason that at the close of each transaction the parties divided whatever profits there might be, and no matter what that relationship was the principal point in controversy relates to the period subsequent to May, 1919. The fact appears and it is not disputed in the brief and has not been denied by counsel in argument, that Dyer testified that Doan told him that a \$300,000 pool was going to be formed, so far as Louisiana was concerned, that each one of the parties was to have a sixth interest. Their conduct subsequent to that time was entirely consistent with the testimony given by Doan, that he intended to carry Dyer for an interest, but he did not say a one-sixth interest, but an interest in consideration of Dyer discharging these other obligations which he had incurred to Captain Lucey and himself. It is entirely consistent because, according to the pleadings, themselves, at that time, they departed from the purposes of the partnership and discontinued dealing generally or in any way in oil lands, Dyer undertaking the management of the North Texas Supply Company and later engaging in the service of the American Oil Engineering Company, and devoting all of his time to these endeavors, whereas Doan continued on in the oil business.

Doan's accounts show that he actually invested \$100,000 of his own money in his Louisiana venture, counsel's contradiction to the contrary notwithstanding. This was found to be a fact by the Master. The account of Dyer, found at page 384

of the transcript, makes a pitiful showing in contrast and outside of the disputed expense account shows that Dyer did not invest a single cent in Doan's Louisiana venture. The uncontradicted evidence further shows that Doan devoted his entire time to acquiring and developing the properties in Louisiana and that Dyer did not devote an hour's time to Doan's ventures. It must be held that there was an entire change in the relations between the parties beginning May 30, 1919, for the reason, as has been suggested, that Doan continued on with his business, devoting all of his time and all of his money to that business, Dyer, on the other hand, supplying no money, devoting not an hour's time to that venture, going out and engaging in two different enterprises for two different corporations entirely dissociated with the business in which they had formerly been engaged. We find Dyer constantly, all through his testimony, in all the letters that were read by counsel, claiming a one-sixth interest, but never a suggestion as to the contribution to any partnership fund; and we find there never was any partnership fund, any joint account, any bank account, any business conducted in the name of Doan and Dyer.

Now, that is the case so far as the appellant is concerned. What is the case of the appellee? This is the contrast I want to make for your Honors: It is that because of certain letters written by Doan to Dyer during the time Doan was engaged in handling his own Louisiana venture, he gives Dyer infor-

mation relating to these projects. Why it is a perfectly natural thing for him to do. As has been said by counsel, there was a life-long friendship. According to Mr. Doan, he was carrying Mr. Dyer for an interest; according to the testimony of Mr. Dyer he had a one-sixth interest. There was no conflict in the testimony, so far as that is concerned, and if that be so it was a perfectly natural thing for Doan to continue to write these letters to Dyer. And then, outside of these letters, what do we find? A few statements, desultory in the extreme, to the effect that the parties were interested together, that they were associated together, and that some day somebody might see their names on some oil cars. There is set forth in the brief a few disjointed excerpts of these letters taken out wherever there is a "we" and "our" referred to, but you will find, by referring to these letters, that Doan is referring to his associates at that time—Titus and Lucey—all through that correspondence.

We ask this Court to contrast the case made by appellant on the one hand and appellee on the other, and apply this conclusive test: If Doan had sustained a loss because his Louisiana venture had resulted in a failure and debts had accrued, which Doan was obliged to discharge, could Doan under the evidence contained in the transcript have come into Court and required Dyer to share these losses? I believe that if the Court will apply this test the conclusion will inevitably be reached that a partnership was never contemplated by these parties and

that under the authorities no partnership can be found to have existed at any time or in any event subsequent to May 30, 1919, and that the Court will conclude that the appellee in filing this suit has endeavored because of his inability to pay for his one-sixth interest, as appears from the letters which he addressed to Doan, known as exhibits C and F, without having to surrender one-fourth of this stock, and that when he found he was obliged to surrender his claimed one-sixth interest in the Doan Oil Company in order to obtain the \$50,000 to pay Doan for his interest he conceived the idea of instituting this action and claiming a partnership. In none of the numerous letters and exhibits introduced by plaintiff could there be found a single word or a single sentence relating to a partnership or any contention that the parties bore the relation of partners, or that they contain any of the essential elements to show that a partnership at any time existed.

I believe that if you will apply that test you will find that according to the evidence in this case, whatever the relationship of the parties may have been, there was a severance or a discontinuance of this relationship on May 30, 1919, and that at that time Dyer was given a contingent interest in the Doan Oil Company, in consideration of him assuming the presidency of the North Texas Supply Company and discharging those obligations and earning the money in which Doan expected to profit to some extent, and you will find, according to his own testi-

mony, and according to his own letters, and according to the letters that he said he received from Doan, which he introduced in evidence, that he was wandering around the country, that he failed entirely to discharge the obligations which he had assumed, and that there was a failure of consideration, there was no mutuality, and that he cannot claim that contingent interest, should be sustained by a judgment of this Court.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

L. E. DOAN,

Appellant,

VS.

B. T. DYER,

Appellee.

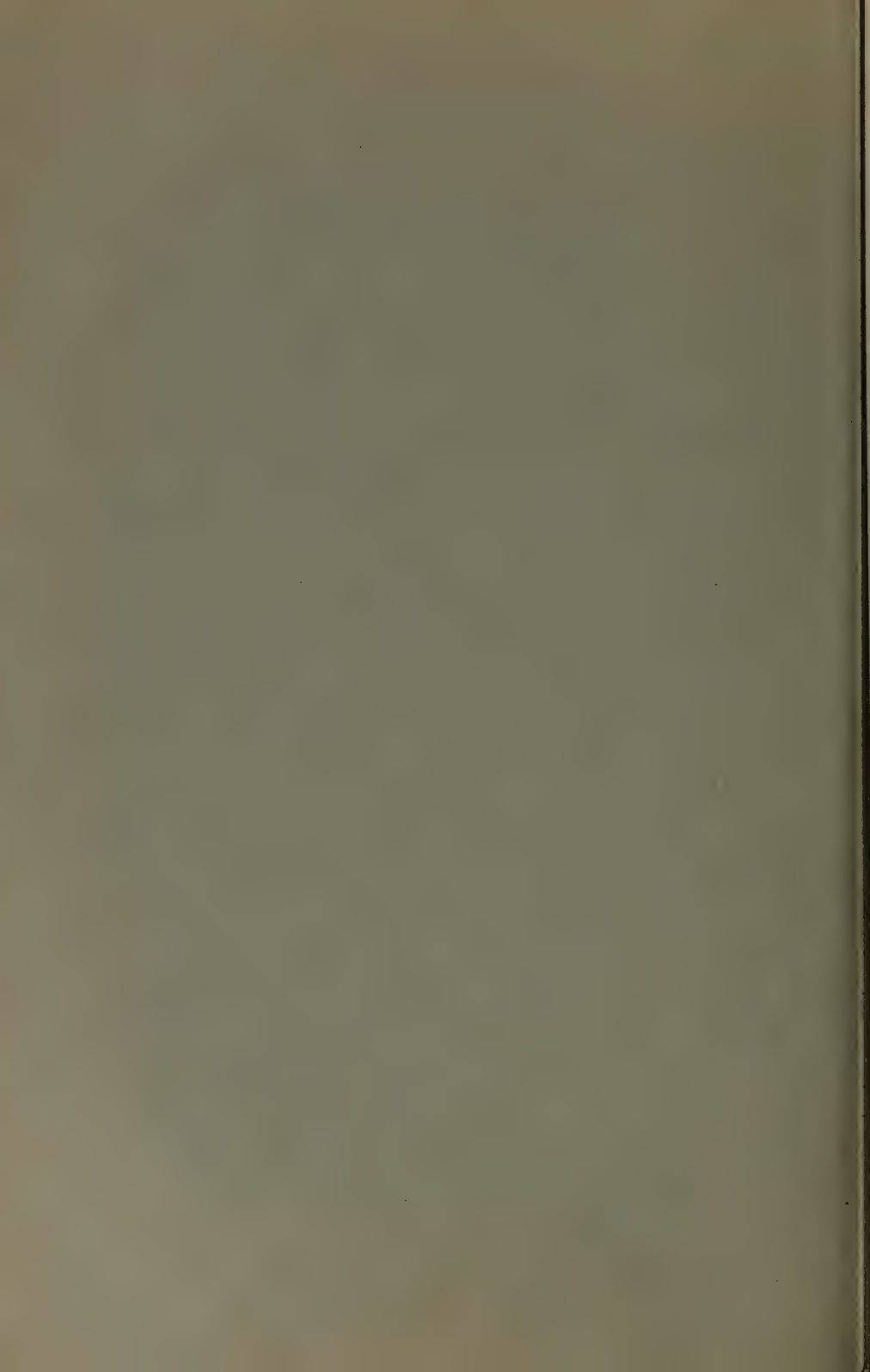
No. 3915

ORAL ARGUMENT OF WILLIAM H. METSON.

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ORAL ARGUMENT OF WILLIAM H. METSON.

Mr. METSON: May it please the Court, I rather think that your Honors might conclude that Judge Rudkin should be fined for signing a decree such as he has in this case upon the record presented by my learned friend here. But I think that Judge Rudkin looked upon this case as the record really is, and not as stated by counsel.

Under the law of California, our Civil Code, Section 2395, defines a partnership as "An association of two or more persons for the purpose of carrying on business together and dividing the profits between them."

The losses, if any, are applied by the law. In this matter there were no losses to be considered.

Dyer and Doan had been friends for years. They had their offices together in San Francisco, in the Balboa Building, till along about 1918. At that time, and while there together, a telegram was received, addressed to B. T. Dyer, Balboa Building:

“It is the consensus of opinion that Ranger Fields lying between Fort Worth, Brownwood, Coleman, offer possibilities as great as Oklahoma. Have just driven through field and this is my own conclusion. Am so impressed that have authorized installation two stores at Fort Worth and Ranger. *Believe you and Doan could make great success, but question the advisability of your coming alone. It requires two. You and Doan have the necessary combination of ideas and energy to make good. In my opinion, there would be no question about you doing so,* although all large Eastern companies as well as Mid-continent and Texas are represented. We will perhaps see the greatest drilling campaign in the vicinity of the prospective fields in the history of the country. I saw one very excellent well producing 1500 barrels of 36 gravity oil, and possibilities are very big and the extent of the field so great that it is difficult to describe them to you in this wire.” (Signed) J. F. Lucey. (Tr. p. 106.)

That telegram was shown by Mr. Dyer to Mr. Doan, away back in March, 1918. They talked the matter over, and after a while Mr. Dyer went to New York, and from there on May 9, 1918, he wired L. E. Doan:

“Carr and Lucey here. Carr just from Texas. They report Texas wonderful. Lucey says had we come when they wired we would have made more than we would have made in California. They report while many lessors are active there is still splendid opportunity on account of area of field proving daily. Talk this over with Fleishhaker if you think best. See if he is interested go in game with us, otherwise believe Toronto crowd will back me. Advise him Wyoming deal made. Will likely be home last of week.”

(Signed) B. T. Dyer. (Tr. p. 107-108.)

Following that, Mr. Dyer returned from New York, and again took the matter up with Mr. Doan in San Francisco. Mr. Doan was tied up by litigation, so Mr. Dyer alone went down to Texas and stayed there six weeks. Then he returned to San Francisco; Mr. Doan was in Seattle, and he wired Doan and Doan answered:

“I arrive San Francisco Sunday morning. Titus will not be there until August 1st. Nothing doing about Texas until he arrives. Do not go until I arrive.” (Tr. p. 153.)

Dyer waited until Doan arrived, and they talked the matter over, and Dyer testifies that they decided to go into partnership, and that he, Dyer, was to proceed to Texas and enter into the business, to be followed by Doan just as soon as he could.

To evidence that, they did talk it over and make a contract and, we have a letter signed by

Doan, dated August 9, 1918, found at page 111 of the transcript. This is an answer by Doan to letters received from Dyer reporting the situation:

“Received your letter of the 4th this morning—with clipping enclosed—I am thoroughly satisfied that there are many opportunities in that country and you are on the right line—it takes big money, however, to do business. I have been thinking hard about the whole thing—and I have tried to make up my mind what is the best way to handle the situation, and *I have about come to the conclusion that our first hunch was the best.*

“I am satisfied, Tom, that *we must first raise at least \$100,000* before we can expect to do any business—*we must have the money first.* As soon as you have some good things lined up so *we* have something to talk about, *we* should then *get busy and raise the money.* Lucey and Titus will go in.” (Tr. p. 111-112.) Following that, Mr. Doan follows Mr. Dyer to Texas, and they continued their investigations there, both in Texas, Oklahoma, and in Louisiana, and they made a deal with some leases there, and bought about 10,000 acres at 50 cents and sold them at \$1.25.

We go to the next letter, may it please the Court, which is dated February 10, 1919, from Mr. Doan to Mr. Dyer:

“*Titus will be here tomorrow* and I will have a further talk with him”—Doan being in San Francisco—“*I think he is the only one we can really*

count on, unless Lucey and Hoover are ready to go. I guess we will have to go to the bat ourselves, and when we find something good tie it up. I am sure Titus will finance anything after we get it and can say it is good. Why don't you go down to Houston and Shreveport, Louisiana and get a line-up there before I come, so we will know where it is best for us to dip in." (Tr. 239.)

Again, on February 15, 1919, from San Francisco, Mr. Doan writes to Mr. Dyer as follows:

"I will not be able to reach Fort Worth much before the 1st of March. Don't you think it would be a good idea for you to go to Houston and Shreveport, Louisiana, before I arrive—get things lined up in these fields—even if Hoover and Lucey don't come through I can depend on Titus, and will want to look all the fields over and pick something good. With all the different lines we can work when we get started there will be plenty for us to do, and we will make good." (Tr. p. 218.)

Mr. Doan still continuing in San Francisco, (Tr. 218) and Mr. Dyer still continuing in Texas, and Oklahoma, and that section, Mr. Dyer, alone, made some investments for the firm. He made a deal with a man named Cockrell; (Tr. 161) he made the deal in his own name, (Tr. 121) he put up his own money, he made the *first payment* (Tr. 161) and he made the *second payment*, (Tr. 160) and before the third payment came due he sold the property and made a profit for Doan and Dyer of \$7000. (Tr. 160.)

Still continuing, Mr. Doan still being in San Francisco, Dyer looked up further properties, and a little later got a property in his own name (Tr. p. 121; Tr. 99) from a man named Olcott in Eastland County, Texas. He gave his check for \$500, (Tr. 161; Tr. 28-9) and later Mr. Doan paid the balance of the money, and it was sold and there was a profit of another \$7000 for Dyer and Doan (Tr. 99; Tr. 181; Tr. 121).

They then went into another deal called the Tillman County, Oklahoma, deal, about May '19. That was a lease which they went in with a man named Couch, who made the first payment on the property. (Tr. 87.) Couch paid \$1000 and then later \$8000 was paid by Doan, and the balance of his half was repaid to Doan by Couch. (Tr. 88.) Title was taken in the name of Tom Owens. (Tr. 123.)

In the meantime there was another piece of land in Texas called the Lamb tract, which was put up to Mr. Doan in Fort Worth, and he asked Mr. Dyer to go from there to Wichita Falls, where this piece was, and look it over, and if he thought it was all right to buy it (Tr. 207). Dyer went up there, looked it over, got Doan on the telephone, and told him it looked good, and they decided to buy it, and he paid \$10,000 down, and then, later on, in 15 days, Doan went up there, looked the property over, and paid the balance of the purchase price, which was \$30,000 (Tr. 208).

In the meantime, on the 10th of April, 1919, (Tr. 320) Doan had gone to Louisiana (Tr. 211)

and made investments in Louisiana, and put up \$1000 or \$2000 for an option on what is called the Clark & Greer property, (Tr. 320) and then, later on, what is known as the Giffen well, about the 10th of April, 1919, (Tr. 263) and then Titus appeared upon the scene May 16-17, 1919 (Tr. Wires p. 226-225) and they talked it over back and forth, and then Lucey came there on the 30th of May, 1919.

Now, your Honors will remember the letters that I have read. That one of the objects for which these people had gotten together was to get money with which to operate together, and the people from whom they expected to get the money were Titus and Lucey (Letters Aug. 9, 1918, Feb. 10, 15 and 19 Tr. 111, 218, 239). Titus put up, and, May 5, 1919 (Tr. p. 214), had put up \$40,000 (Tr. 214). Lucey put up \$50,000 June 17, 1919, July 15 (Tr. 341) and they went into this deal over in Louisiana, and they made a corporation called the Doan Oil Company, and into this Doan Oil Company Doan says that he transferred this Lamb tract in Texas, and this other Tillman County property in Oklahoma. This he did not do. It remained in Owens' and his names.

The business of the corporation was oil. The capital stock was fixed at \$500,000, and 300,000 shares were issued, 150,000 to Mr. Titus, 100,000 to Mr. Doan, and 50,000 to Mr. Lucey (Tr. 169). Lucey put up \$50,000, but until September, 1919 Doan put up none of his money at all. He was

playing for a sure thing (Tr. 339). All of this argument about Mr. Doan being the boss and doing this and that and the other thing, and all the property being in his name I have shown is not true. It resolves itself down into this, as your Honors will see when you scrutinize this record. You will see the shrewdness and the capacity of this lawyer, Doan, throughout this entire transaction. He had the purpose of doing up somebody, and taking good care that he did not get his own fingers burned.

I now read from the record of the Doan Oil Company, at page 169 of the transcript: "President Doan reported that prior to incorporation he had purchased the following oil leases, which were conveyed to him as trustee. Pugh lease, \$8025. Oklahoma lease, \$8060. Always in the name of Tom Owens (Tr. p. 89 Check). Burkburnett lease, \$40,000, that is the Lamb tract, the Commanche lease \$1000, the Looney lease \$8800, Bull Bayou lease \$3547.50, making a total of \$69,432.50." Also that he made the following disbursements for the benefit of the company, the Looney lease: equipment \$3000.53, sundry expenses \$1614.09, automobile equipment \$2797.52.

Now in their operations down in that country these men, Dyer and Doan, together, had bought an automobile, (Telegram Tr. 232) and this is the automobile equipment Doan is taking credit for in the Doan Oil Company, (Tr. 346-7) in which Doan says Dyer is not interested at all, he is out of it; that is too good for Dyer to be in.

Reading further from the minutes: "also that he had sold the Oklahoma lease for \$8917.50". He charges in the Oklahoma lease, which is this Tillman County, Oklahoma property that I was talking about, in which he owns only a half interest, costing about \$500—he charges that in at \$8060. He said also he sold the Oklahoma lease for \$8917.50. That was not true, because that property was never in Doan's name (Tr. p. 121). This was bought May, '19 and part sold Feby. '20. See check (Tr. 89). The only piece of property in this deal, outside of some in Louisiana, that was ever in Doan's name, was this Lamb tract at Burkburnett of 5 acres. Couch, in May, took the Tillman County, Oklahoma, property in the name of Tom Owens, (Tr. 121) and he sold 40 acres for more than they paid, (paid \$4000 and got back from first 40 acres \$5387.50 (Tr. 88) so that Doan got back out of the 40 acres about \$750 more money on June 10, 1919, (Tr. 88) before the organization of the Doan Oil Company, which was June 27, 1919, than he paid for his half interest in the whole tract, and there were 35 acres left in the name of Tom Owens. In other words, he got \$750 to \$780 more money back before this corporation record I read was made. And on February 9, 1920, he got another check for \$2700 odd (Tr. 89; Tr. 98). This deal on the Oklahoma tract was made between Couch and Dyer; (Tr. 87) in this instance they, not Doan, made the deal (Tr. 91). Dyer was on the ground. He telephoned to Doan, and it was agreeable to him, and they took it over,

and the proceeds went into the Doan Oil Company, (Tr. p. 88; Tr. 89) and still Dyer isn't in the Doan Oil Company, although Dyer paid the attorneys fees for examining title and recording (Tr. 164, 287). Money was put up by Mr. Dyer for his half of the automobile, (Tr. p. 233) and that went into the Doan Oil Company, (Tr. 232) in 1919, in July, (Wire Tr. 232) and Doan took credit for it (Tr. 169, 170) from Doan Oil Co., and yet Dyer is not in the Doan Oil Company at all. And this Lamb tract, which Dyer went up there and bought, and which Titus paid for, went in (Dyer paid the Atty. fees thereon, Tr. 164)—and Titus and Lucey were the men that they had in mind (Letters Tr. pp. 111 and 218) to furnish the money, and who did furnish the money—and yet, Dyer isn't in the Doan Oil Co. No.

The record shows they went on with their business in April for the purchase of land in Louisiana, (Tr. 263). (Wire May 17, 19, Tr. 225; Tr. 226) followed by purchases in May, (Tr. 225-226) and then we come down to this North Texas Supply Company that counsel deraigns about.

The Doan letters of February 10 and February 15, 1919, (Tr. 218; Tr. 239) and the letter of August, 1918, (Tr. 111) from Doan to Dyer, say explicitly,—That is what we want, we want Titus and we want Lucey, and we want them to furnish the money. So on the 30th of May Doan brings Lucey into Dyer's room and says, "Now, good morning, Mr. President"—and Dyer objects and

says, "What is this?" And he said, "We are organizing a supply company, and we want you in." He said, "I am not in the supply business, I am in the oil game, I do not want to go into the supply game, and I won't do it." They talked around for a while trying to persuade Dyer to go in, but he would not go in. Then Doan said to them, "I want to talk to Dyer alone" (Tr. 298). So he talked to Dyer alone, and he told Dyer this: "Now, Lucey will put up \$50,000 in this business over in Shreveport if you will take charge of this supply business; (Tr. 299) the Lucey Manufacturing Company cannot go into Wichita Falls, (Tr. 284; Tr. 291) they have a contract with the Continental Company and they cannot go in under their own name, and we want to organize a company, and if you will take charge of it and act as president Lucey will put in \$50,000 in the oil game in Shreveport." They talked it over for a while, and Dyer consented to head this Wichita Falls transaction, and did head it. They subscribed \$50,000, mostly by Lucey—they collected only \$40,000 on the subscription (Tr. 306). Dyer brought the stock up to par and made it worth \$2.18 a share. He made \$100,000 for it in six months. Doan's letters to Dyer show that Lucey had informed him that he wanted Dyer to get the \$10,000 bonus stock for so doing that had been agreed upon (Tr. 141; Tr. 148; Tr. 223). The letter of November 13, 1919, shows that Lucey had written that Dyer had managed the company so well that he wanted Dyer to get the bonus stock, which

had been agreed upon, if Dyer made a success. Doan objected, (1920 Tr.) although Doan was to get half of the bonus stock. Doan testified he, Doan, was not to get it, (Tr. 214) but this case was brought first in the State court, and as soon as the action was commenced we took Mr. Doan's deposition, and in the deposition (Tr. p. 262) as a witness Doan admitted he was to get half of the bonus stock; evidently, he had forgotten it when he testified in the trial. They went on for a while further, and Doan protested against the issuance of that bonus stock (Letter to Colby, Tr. 257). It was agreed Dyer was to be carried by Lucey for some stock (Tr. 314; Tr. 287); he was not carried. Lucey did not have the money and Dyer would not put any money into the oil supply business. The record shows that Carr wrote him in 1920 congratulating him upon the success of the North Texas Supply Company (Tr. 280).

The North Texas Supply Company is pitchforked into this case without any paternity, whatsoever.

If there was a contract made originally, and the court found that there was one, and we hope your Honors will find that there was one, and the other side deny it in their answer here, then they should have pleaded a breach of that contract, or some other contract taking the place of it,—a novation, a release—the end of that contract and the making of a new one. It is not in their answer, and the North Texas Supply evidentiary attempted defense has

no standing in this court, and had no standing in the court below, because they did not plead it.

Now, being aware of the rule that oral testimony is to be scrutinized carefully, I want to call your Honor's attention to the evidence that demonstrates that Dyer was interested in Louisiana. W. L. Leland testified:

"Shortly after Doan made his trip to Louisiana when he bought the 40 acres from Greer & Clark, then on subsequent trips he made down there I had conversations from time to time with him referring to Louisiana property. It was pretty early in April when he made the first purchase. He showed me maps when he came back. He suggested I buy an adjoining piece, and I went down and looked at the land. The first conversation, I think, was in the morning he returned from Louisiana back to Fort Worth. Doan said, 'Tom and I are in a way to make a lot of money down there' (Tr. p. 93). F. E. Couch testified to practically the same thing. Jacob Berger testified to conversation with Doan of similar character. F. L. Keller testified to conversation of similar character. H. F. Berry testifies to conversation of similar character. Mestre Olcott testified to conversation of similar character. Edward J. Buckingham and L. E. H. DeSallier testified to conversations of similar character, and so does A. P. Jergens. Joseph Martin testified, 'I remember some conversation with reference to some oil tank cars about May, 1919. Doan said 'Sometime you will see Doan & Dyer's name

on the cars for the oil that came out of Burkburnett field.' That is in Burkburnett, where they had some property" (Tr. p. 292). Leslie J. Coggins testified, "I know Doan and Dyer. I saw them in Texas in 1919, in May. Mr. Martin and myself met them at Wichita Falls. They said they owned a 5-acre tract there. Mr. Doan or Mr. Dyer said, 'Well, Mr. Martin, some day—you see those tank cars over there—you will see our names on them, Doan & Dyer; we will get it right up here in this little field' " (Tr. p. 205).

Is Doan mistaken or were all these witnesses mistaken?

Now, take the North Texas Supply Company. In the first place, they claim that Dyer absented himself from Texas, or Wichita Falls. The record shows that he went away on business each time; he came to California to buy tools, (Tr. 307) and to New York on business (Tr. 307-8).

Counsel does not in his argument, or in his brief, quote the transcript correctly, nor did he, in his argument a few minutes ago, quote correctly what was said by Mr. Dyer. Counsel says Dyer testified: "I never invested one cent individually in any of these projects of Doan's", and he told you that with great ego. But the transcript reads this way: "I never invested any money in Louisiana in any property in which Doan was interested *except through Doan*", and then Dyer goes on, "I never invested one cent individually in any of these pro-

jects of Doan's." My colleague must have overlooked the first part of the statement I just read, or he would not have said what he did.

He also did not read far enough in the letter of October 12. At page 130 of the transcript I read further, "While there is a big boom on here, I have not seen anything that I could recommend to your crowd—that we cannot handle ourselves—and as I said before, I cannot afford to mix up with you on any outside deals in Louisiana—I don't want to be criticised by Titus and Cap. Lucey—so I think it is the better policy for you to confine your operations to Texas and Oklahoma for the present—if I should start something else here it would result in hard feelings, and I want to avoid that if I can."

Now, if the Court will bear that in mind, that letter is dated October 12, 1919, but when your Honors come to look at this record and for comparisons look at the letters in September preceding this, you will find there that Mr. Doan urges Mr. Dyer to send Delaney over there for the purpose of the California intended investment, to make investigation of the Homer field (Tr. p. 243; Tr. 145; Tr. 245) Mr. Ray tells him that the Homer field is coming in, and it would be a good thing for the California company. In the September letters Doan was for investing in Louisiana. In October he changed. These letters run from September 1st to 20th, at which time something happened over in Louisiana. A well came in on the 25th of Septem-

ber, 1919, for the Doan Oil Company, producing 4000 barrels a day of \$2 oil. A telegram is in the record from Doan to his brother, telling him how fine things are looking for the Doan Oil Company, so that, after that well came in, there was in Doan's mind no place for Dyer (Tr. 376).

If your Honors please, the first purchase in Louisiana, to which place Dyer was not permitted to go, you will remember, was on the 10th of April, 1919, followed up by the 20th of April, 1919, and then followed up later on. Doan says Dyer was not interested, but follow me. On the 15th day of May, 1919, Doan wired from Shreveport to Dyer at Fort Worth, "Better go to Burke tonight. Sell both pieces soon as possible. Also Eastland acreage. Can use the money here to better advantage. Things look fine" (Tr. 225). That is on the 15th of May, 1919, before Dyer was told in this *private* conversation he could not go to Louisiana.

Again, on May 16, the next day Doan wired Dyer:

"We have bought several pieces. Will tell you details later this week. Like Shreveport as best place to do business" (Tr. pp. 225, 226). Now counsel has just told you that these telegrams are not from one man interested with another man, but that they were just general conversation.

On the 18th of May, 1919, Doan wired Dyer from Shreveport:

"We have made big purchases here of wonderful properties and need the money" (Tr. p. 226).

That is just information between one friend and another, but Dyer could not go to Louisiana,—was what Doan said.

On June 11, 1919, Doan wired from San Francisco to Dyer:

“Leaving for Shreveport Sunday night. Have arranged everything satisfactorily. Glad to hear good news” (Tr. p. 227).

That was with reference to one of the wells that had been bought in April, 1919, in Louisiana, and Dyer found that the well had landed, and he telegraphed Doan to San Francisco, and that is Doan’s answer to Dyer.

On June 17, 1919, Doan wired to Dyer:

“Giffin well completed. Looks fine. Hundred barrels. Everything in all fields looks encouraging” (Tr. page 228). That was just before the formation of the Doan Oil Company, on June 27th. It was just information—my learned friend says—from one friend to another. On June 24, 1919, Doan wired to Dyer:

“That well came in as a big gasser. No oil yet. Don’t look good” (Tr. page 230).

On June 25, 1919, Doan wired from Shreveport to Dyer:

“Titus and I have bought 80 acres of good stuff” (Tr. page 231).

On July 7, 1919, Doan wired from Shreveport to Dyer:

"Giffin well pumping over 100 barrels. Had cash offer of \$25,000 for Bull Bayou forty. We are putting up rig there now. Also drilling the second well on Giffin lease. Everything fine here" (Tr. page 231).

On July 18, 1919, from Shreveport Doan wired Dyer at San Francisco:

"Drilling at Bull Bayou big well just in near southeast corner of Pine Island lease which absolutely proves all of it. Come soon as possible" (Tr. page 234).

And this is all going on while Dyer is being *held* out of Louisiana.

On July 8, Doan wired to Dyer:

"Clark and Greer well on adjoining forty Bull Bayou forty flowing over thousand barrels from top of sand our ten inch casing cemented to-day" (Tr. page 233).

From there on, page 235 of the transcript, 236 of the transcript, 241 of the transcript, 243 of the transcript, 244 of the transcript, 237 of the transcript, 238, 246, 247 and 248, and 249, there are similar telegrams and similar letters which counsel says are merely information given from one friend to another, a lifelong friend, and the record shows that they met in 1907 down in Bakersfield.

The record will show that they had a deal with a man named Jergens along about April, a deal made by Dyer alone (Tr. 312), on which Doan got \$750, and the Archer County lease they made \$375 apiece on, a deal made by Dyer alone (Tr. p. 312).

In Louisiana Dyer made a deal on which they made a profit (Tr. 123). I have already given the Eastland County deal, the Tillman County deal, and the Lamb tract. Doan says, "I told Dyer to go up to Wichita Falls and make a very careful examination of the situation, and find out if there was any reason why we should not purchase the property" (Tr. 207). The title to that property was taken in the name of Doan, Trustee—that was in the record that I read to your Honors of the Doan Oil Company, showing that he transferred it to the Doan Oil Company—but later on, on cross-examination, he was obliged to say he carried it in his own name, Doan, and that he had sold it to a man named Carter, a friend of Titus, in Washington, for \$50, and evidently, on the testimony, the transfer was made for the purpose of evading income tax. He sold it to a man he never saw or heard of, sold it at a meeting at which Titus was present, and the suggestion was made by Titus that Carter was a neighbor of his, and Carter, without knowing anything about it, bought the property for \$50. That is all in the record (Tr. 206).

Now, the following pages of the transcript, 252, 208, 206, 221, 222, 224, 225, 226 and 162, will show the activities of Dyer in connection with the Lamb tract, that he (Dyer) paid for passing the title and he (Dyer) never got the money back for it, and that property went into the Doan Oil Company, through Doan hands, and still Dyer is not interested in Doan Oil Co.

Now, as to the American Oil Engineering Company. Counsel laid great stress on the fact that Dyer went away to Pittsburg in October. At that time they were very short of pipe over in Shreveport, and he went to Pittsburg in the interest of the American Oil Engineering Company for pipe for Oklahoma and pipe for Shreveport. He went on the business of the North Texas Supply Company, and to make a profit for it, and while there he met Mr. Meredith, of the American Oil Engineering Company through a wire transmitted by Doan. The understanding that they had when they made this North Texas Supply Company was that it was to only run a few months, when the Lucey Company was to take it over. Dyer was not to be tied up long. The American Oil Engineering Company wanted to tie up Dyer at that time, and Dyer declined until he came back and talked with Doan (Tr. 125). When he came back and talked it over with Doan, and told him what the proposition was, Doan told him to go ahead, that was the right thing, and it would put them in touch with big money, and later on a deal was made, an arrangement was made to begin in January, 1920 (Tr. 306), long after Dyer was to be out of the North Texas Supply Company. He was paid in January, 1920, \$1000 as a retainer (Tr. 306). That was carried on with the full knowledge of Doan, Doan knowing all the time he was drawing down the \$1000 monthly as Doan was doing likewise from the Doan Oil Co. The American Oil Engineering Company did carry a block of stock for

Dyer & Doan in it, American Oil Engineering Company (Tr. 167, 168).

With reference to the automobile, I want to refer to pages 231, 232, 264, 169 and 170. That was the machine that was purchased and then taken by Doan over to Shreveport and turned into the Doan Oil Company, and he took credit for it (Tr. 339).

Now, as to the Santa Maria Doan Syndicate. That was a California affair, and existed before they went over to Texas. It seemed that Doan advanced some money in 1918, and along in December Doan wanted it. A telegram was sent by Doan December 19, 1919, "I have obligations to meet January 1. Can you send in the \$6000 advanced by me your account Santa Maria well" (Tr. 159). The telegram was sent from Shreveport to Dyer in New York. Dyer answered: "Your wire 19th received just as I am leaving for California. I will arrange Santa Maria obligations from California if I am not in Texas before, but ask you to send statement Van Nuys Hotel, to meet me if possible in time. Did you close Santa Maria account since salvage? This was not done our last talk on this. At same time will you have Doan Oil Company statement Van Nuys for me, and also your and my joint account regarding Doan Oil Company and Louisiana. Will be glad settle both accounts if you wish. Try have this for me so I can meet your request. Will be Van Nuys for Christmas and keep touch with you. Best luck and Merry Christmas" (Tr. 293).

That is the telegram that was sent in reply to Doan at Shreveport from New York by Dyer.

Later on, on the 29th of December, 1919, Dyer being in Los Angeles and not having gotten anything from Doan, and received no word, wired to Doan at Shreveport from Los Angeles:

“Received no word or Santa Maria information at Los Angeles. Will fix this up if you can send it here. Discounted thirty thousand Lucey accounts in addition have January obligations financed now” (Tr. 294).

The Santa Maria account did not come, and the letter of January 10 following shows that Doan was looking for the books on which to make a statement, therefore he had not and could not then do so, and no statement was made until the 22nd of September, 1920. In the meantime, on the 21st of January, 1920, Dyer and Doan got together at Fort Worth and they had a talk about Dyer taking over his portion or half of the Doan Oil Company stock. Dyer wanted his stock, and Doan was still stalling, as he had been continually stalling theretofore. For instance, the record will show that on the 10th of November of 1919 Lucey, and Titus, and Doan, the three directors and only stockholders of the corporation, were in Shreveport, they had a meeting there, and on the 10th of November agreed that another 100,000 shares of the Doan Oil Company stock should be issued, and that it should be taken by the stockholders pro rata, that is, 50,000 shares by Titus by reason of his 50% stockholdings, 33,333 shares to Doan by reason of the stockholdings of Doan, and 13,000 shares to Lucey

by reason of the stockholdings of Captain Lucey (Tr. 171). On the 11th of November, the next day, Mr. Doan telegraphed Mr. Dyer:

“Titus and Lucey here. We have made no plans except to go along as usual” (Tr. p. 158). He concealed this stock issue from Dyer. He never told Dyer about this stock that was put out at this time. Your Honors will see from the record how the Doan Oil Company was going ahead by leaps and bounds, how, one well after another had come in. That they had sold off wildcat acreage at a price as high as they originally had paid for good acreage, and yet he deceives Dyer by this wire and Dyer discovers it at the trial. Titus had taken all of his stock, and Lucey had taken all of his stock, and the relatives and friends of Doan had taken all of his stock.

We get along again to January 21st, 1920, and we find there that Mr. Doan and Mr. Dyer are having a talk. Doan said that Dyer asked him for the stock, and in one place Doan said he agreed to give Dyer the stock and carry him for one-quarter, and in another place Doan said that he was going to give Dyer 50,000 shares of stock if he got his money, and he said Dyer gave him a check on that day for \$3000 on the Santa Maria obligation. However, there is a dispute about that conversation. Dyer said he told Doan he wanted his stock and wanted a settlement. But if your Honors will follow the letters and telegrams received and sent to Mr. Doan, and which are in the record—and, by the way, the

letters of Mr. Doan to Mr. Dyer, from July on, frequently acknowledge receipt of letters and telegrams from Mr. Dyer to Mr. Doan, but there are none of those telegrams or letters in the record. Mr. Doan must have received them, for he acknowledged receipt of them. He had an office in Shreveport, but he never produces a single one of them—not one; there are none of them in the record; why they are not here, we do not know. Were they here they would demonstrate who is right in this litigation.

But here is a letter following the conversation of January 21, 1920, which may throw some light on knowing whether Doan and Dyer were partners in the Doan Oil Co.

“Mr. L. E. Doan, Dear Larry: I am going to hold off the getting of the \$50,000 until the last minute after you have had your meeting with Mr. Titus and decided on your policy. I will not do this to inconvenience you, but for the purpose of being guided in getting my money. It will, of course, be necessary for me to give up a small piece of it in order to get this money, but should you decide on a sale policy, either of land outright or stock that would reimburse present holders, I, naturally, would want to take advantage of that and not give up any interest other than is necessary. This feature dawned on me after you left last night, and I wanted to explain it to you for your approval.” (Signed by Dyer) (Tr. 195).

On January 23rd, from Shreveport, Doan writes to Dyer: "I am in receipt of yours of the 21st and will state that there is no possibility of our making a sale of any property within the next few months" (Tr. 196).

If your Honor please, bear in mind that date is January 23, 1920, a letter from Doan to Dyer.

"If we do, the money would not go to the stockholders, but would go into the treasury *for expansion purposes*" (Tr. 196). That date and statement is interesting from this fact, that the testimony shows that Doan was then contemplating a dividend. Evidently it was to discourage Dyer. On the 23rd day of March, just 60 days after that, the company declared a dividend of 50 cents a share, half what the stock cost originally. There was no intention of their doing what Doan writes here, on January 23, that the money would go into the treasury *for expansion purposes*. There was no intention in the mind of Doan when he wrote this letter of doing anything of this kind, because on that date they were then negotiating for a sale to the General Petroleum Company, as I will soon show (Tr. 369).

Doan says: "If you are unable to arrange for your money by the 1st of February we will have to change *our* plans somewhat, because—I will have to raise some money at that time, and I am depending on you. Let me know at once, so I can make my arrangements accordingly. *If you have to give up one-quarter to raise your money, I will do it for you on the same basis*" (Tr. 196). There is a direct

admission from Doan that Dyer did own an interest in the Doan Oil Company. Reference was made in the preceding letter of January 21, 1920, that Dyer has to give up something for getting the money (Tr. 195), and here Doan says "If you have to give up one-quarter to raise your money I will do it for you on the same basis." Now, on the 26th of January, 1920, three days afterwards, Dyer replies to that letter of Doan's as follows:

"I explained to you when you were here it was agreed I could get this money by giving the $\frac{1}{4}$ interest mentioned. You state you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis as it would eliminate any outsiders or complications.

"I will go no further to obtain this money on the outside. I want this absolutely agreeable to you either way, and if you prefer to have me get the money advise me and I will get it at once." Signed by "Dyer" (Tr. 197).

On February 9, 1920, Dyer follows that letter up with another letter to Doan (page 198 of the transcript):

"Mr. Couch has given me a check for \$2700, which is one-half of the selling price of 20 acres out of the Tillman County property." This still left 15 acres, the money for which Dyer got in March, 1920. That was the property, as I explained it to your Honors, in Oklahoma, which was turned in to the Doan Oil Company, and which was sold by

them for \$8000 odd. Here is an additional amount of money sent by Dyer to him on that sale. Whether the money got to the Doan Oil Company, we do not know, but from looking at the minutes at page 170, where Doan apparently foreclosed this transaction as to any future income or profit and putting two and two together it looks rather strange to me.

But, going on on that line, further on, at page 199 of the transcript Dyer says, "I have not had a letter from you in answer to my last letter asking if it was agreeable, as you had mentioned, on the carrying of my Doan Oil Company interest." Nor did Doan answer.

Now, may it please the Court, on the 22nd of March Dyer went over to Doan and demanded a settlement, and they had trouble there, and that was the date of the dissolution of partnership, as stated in the pleadings.

In the meantime, I had not quite finished with the Santa Maria business. Along in August of 1919 Doan wrote to Dyer and told him to put in a statement of his expenses and account, and they talked it over, and Dyer put in a statement of \$2600 odd. That was half of the automobile, and half of the expenses of the Oklahoma tract, and time put in in Oklahoma, and on the Lamb tract.

Dyer paid \$3000, according to Doan, January 21, 1920, although the check is dated December, 1919, on the Santa Maria deal. Counsel has arraigned Dyer claiming he owed Doan money on this Santa

Maria deal. The testimony shows Doan claimed \$6000 from Dyer on Santa Maria deal and Dyer gave a check for \$3000 and add the \$2600 on the automobile and Dyer's half of deal with Tom Owens and Couch and the money he was in on attorneys fees and Dyer was then over by \$1500.00 any claim Doan had. Dyer did not owe Doan any money he did not want to pay at all times on every transaction. He made a demand of Doan in 1919, insisting on a settlement, and he was finessed by Mr. Doan at all times out of a settlement. Doan told him to let it ride, although Doan was borrowing money himself, (Tr. 261; Tr. 355) evidently against that Doan Oil Co. collateral, but he would not give Dyer his share of collateral.

Now, as to the bonus stock in the North Texas Supply Company, I refer your Honors to the transcript, pages 214 and 262, where Mr. Doan flatly contradicts himself. In one place he said he was to share in the stock and the other place he said he was not. That is for your Honors to decide. That Doan was borrowing money, I refer your Honor to the transcript, pages 355 and 261.

Now, as to rig-building, and all of these things about the North Texas Supply Company, the testimony shows beyond contradiction that Dyer did put in a drilling concern, that the drilling concern was a failure, that the State Commissioner of Texas would not allow them to land tools or open a well there for a while. Mr. Carr says that Dyer sold all he could get from our company (Tr. page 281);

if he could have gotten more deliveries he could have sold more stuff (Tr. page 281). Dyer went to Shreveport and sold a good deal of stuff there (Tr. 282). Counsel applauds Carr,

“Well”, Mr. Doan writes, “I am thoroughly disgusted with Carr”, in his letter of October 27 (Tr. pages 248-249). “I am through with taking any of his bull”, referring to Carr (Tr. page 246).

Now, about Mr. Dyer’s ability to get the money to carry his stock, the record shows that he had the money coming from Fleishhacker, and from Porter, that he could get that at any time (Tr. 305).

Stress was laid upon the point that Mr. Dyer had the power of attorney of Mr. Doan. That was their method of doing business. Mr. Dyer had Mr. Doan’s power of attorney (page 121). Mr. Doan had Mr. Dyer’s power of attorney (Tr. 127).

So I do not see but what is sauce for the goose should be sauce for the gander.

The telegram I referred to about the value of the well is Transcript page 376.

There are very many other issues in the case, may it please the Court. There is the contract with the General Petroleum Company, three parties to the contract, Mr. Titus and Mr. Doan the parties of the first part, the Doan Oil Company party of the second part, and General Petroleum Corporation party of the third part (Tr. 369). The contract was that the General Petroleum Company should be given an option to purchase the property.

The Doan Oil Company was represented by Doan, president of the company, in the contract, and the General Petroleum Company paid down \$50,000 in cash, which shows the value of the property, and they paid down a large block of stock for the privilege of taking this option. Mr. Doan contended that that was a personal deal between Mr. Titus and Mr. Doan, on the one side, and the General Petroleum Company on the other side, and they were entitled to all of it. The lower court held that the transaction was in a fiduciary capacity, and was for the benefit of the stockholders of the Doan Oil Company. And I think, when your Honors come to look into this case you will find a most consistent effort on the part of Doan to do up another man, and when it is all boiled down and gets down to matters of cause and effect that you will find that Doan and Dyer were to get the money from Titus and Lucey, that they did get the money from Titus and Lucey, and that when Doan got that money into his hands and it turned out so well, he could not withstand his avarice, and he started immediately to do up Dyer entirely. An oral contract was proven, and you will find that an oral contract was proven out of the writings of Mr. Doan; you will find it not only in the telegrams and letters I have read, but you will find at least thirty more of the same character and kind that I have read to you in the record.

United States
Circuit Court of Appeals

For the Ninth Circuit.

6

JERRY SIMPSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

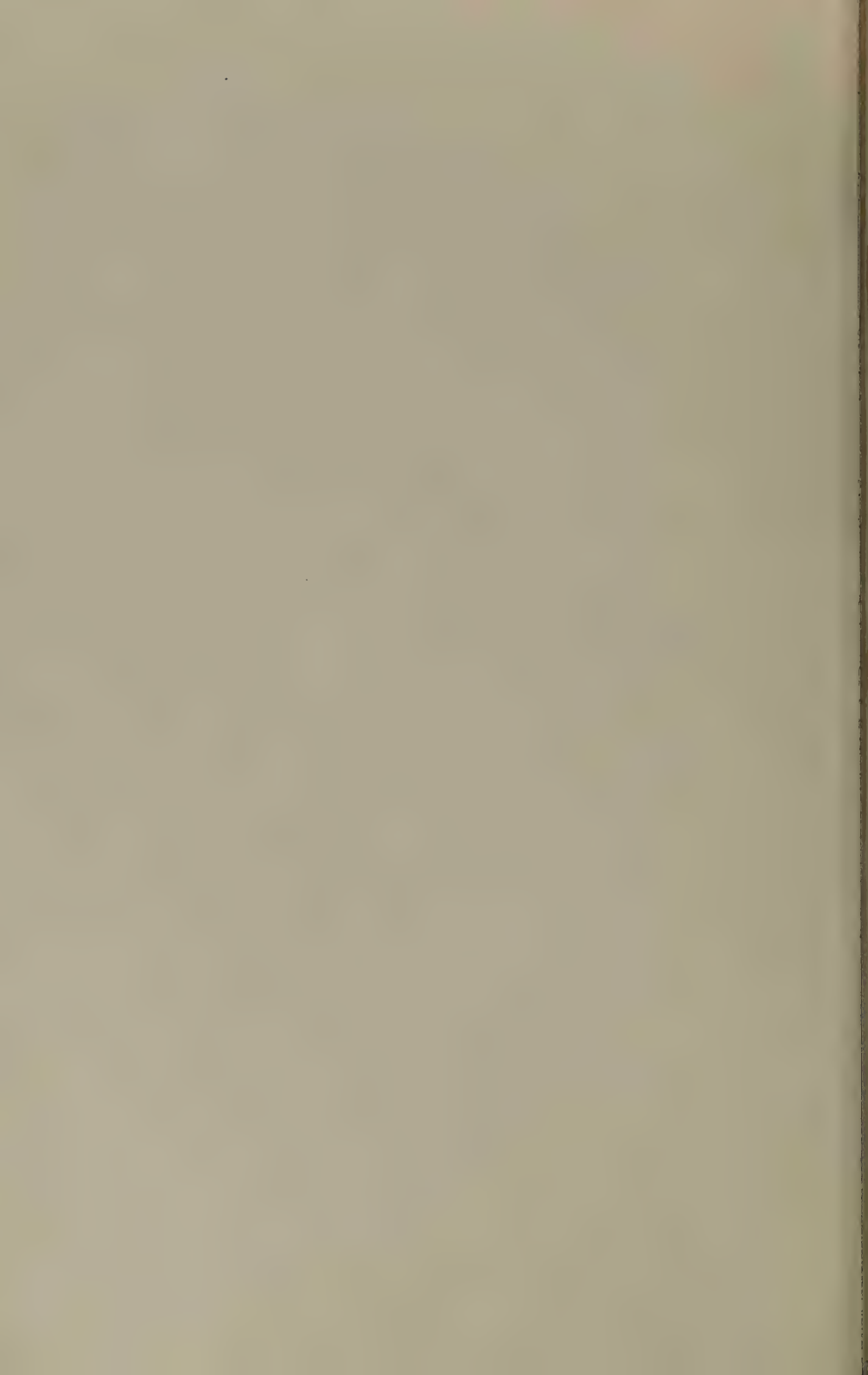
Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Alaska, Division No. 1.

FILED

FEB 5 - 1923

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CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit.

JERRY SIMPSON,

Plaintiff in Error,

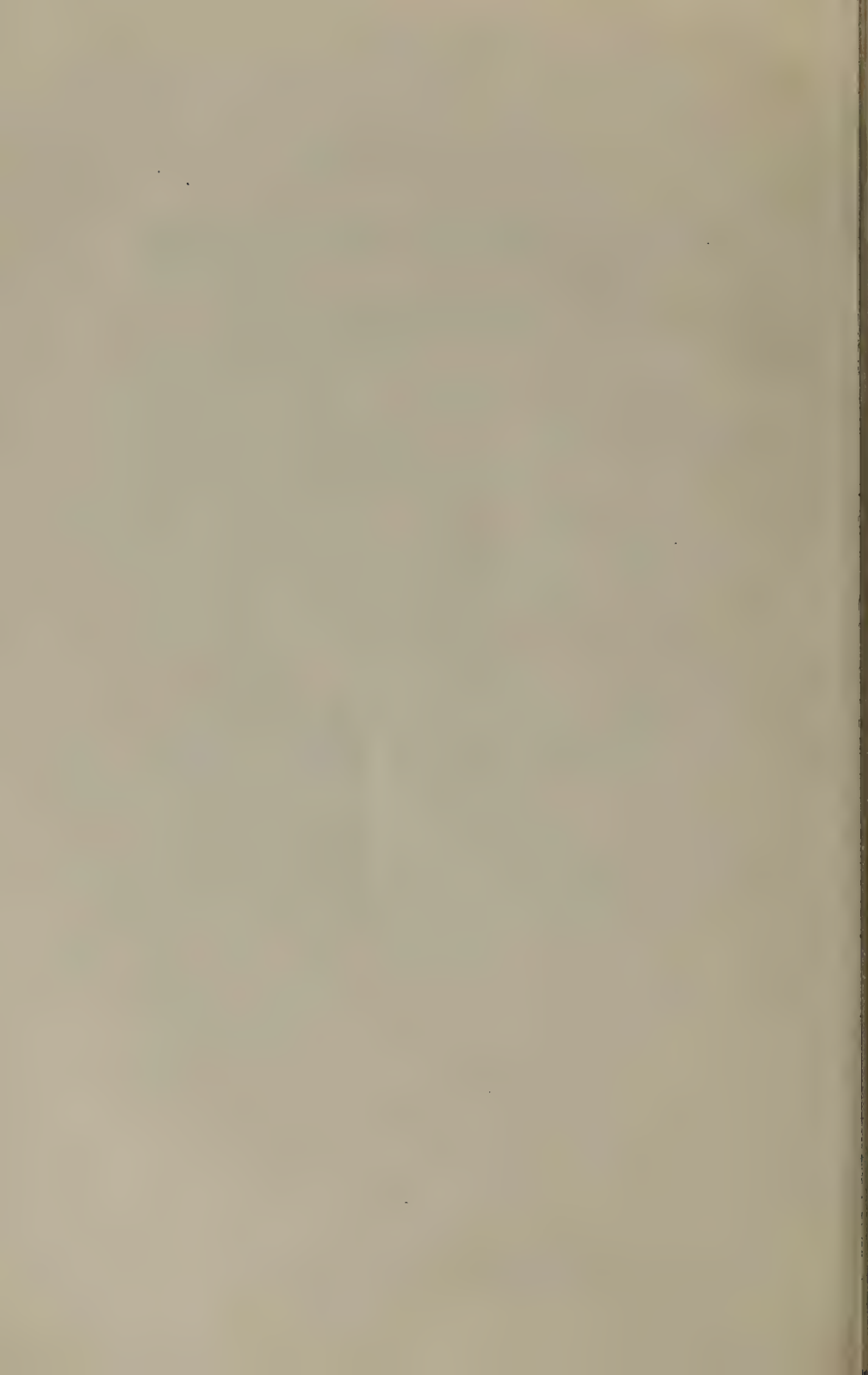
vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Alaska, Division No. 1.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Commissioner's Court at
Ketchikan, Alaska.

UNITED STATES OF AMERICA

vs.

JIM SIMPSON and JERRY SIMPSON.

**Complaint for the Violation of Section Alaska Bone
Dry Act, Public 308.**

Jim Simpson and Jerry Simpson is accused by Fred Handy in this complaint of the crime of having intoxicating liquor in their possession, committed as follows: The said Jim Simpson and Jerry Simpson, at Ketchikan, Alaska, in the District of Alaska, and within the jurisdiction of this Court, did on the 7th day of January, 1922, wilfully and unlawfully have concealed and in their possession and under their control intoxicating liquor, the same being in violation of the Alaska Bone Dry Act, Public No. 308, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

(Signed) FRED E. HANDY.

United States of America,
District of Alaska,—ss.

I, Fred Handy, being first duly sworn, depose and say that the foregoing complaint is true.

FRED E. HANDY.

Subscribed and sworn to before me this ninth day of January, 1922.

(Seal) A. W. FOX,
United States Commissioner, and *Ex-officio* Justice
of the Peace. [13*—2]

In the Commissioner's Court for the Precinct of
Ketchikan, Territory of Alaska, Division Num-
ber One.

UNITED STATES OF AMERICA

VS.

JIM SIMPSON and JERRY SIMPSON.

Search-Warrant.

To the United States Marshal of the District of
Alaska, Division No. One, or Any Town Mar-
shal or Policeman for the Town of Ketchikan,
Alaska.

Proof by affidavit having this day been made
before me by Fred Handy, said affidavit stating
facts from which it appears that there is probably
cause to believe that the above-named defendants
have concealed and have in their possession and
under their control, in the following described
premises, namely, in that certain two-story frame
building situated at the southerly end of Front
street in the town of Ketchikan, Alaska, and known
and designated as the Northern Hotel and Bar and
in the lower story or ground floor thereof and par-
ticularly in that portion thereof known and desig-

*Page-number appearing at foot of page of original Certified Transcript
of Record.

nated as the "Dory," and in said Ketchikan Precinct, Alaska, alcoholic liquors;

You are therefore commanded to at once thoroughly search said described premises and the appurtenances thereof, in the day or night time, and if alcoholic liquors be found, to take into your possession and safely keep to be produced as evidence when required, all alcoholic liquors and all means of manufacturing or dispensing the same, also all the paraphernalia or part of the paraphernalia of a bar-room or other alcoholic liquor establishment and any United States Internal Revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time between the first day of January, 1922, and the seventh day of January, 1922, and [14—3] forthwith report all facts to the United States Attorney or his deputy and bring all such alcoholic liquor and the means for dispensing the same, and the paraphernalia of a bar-room or other alcoholic liquor establishment or United States Revenue receipt or certificate, as aforesaid, before me to be disposed of according to law.

Given under my hand and official seal this seventh day of January, 1922.

A. W. FOX,

United States Commissioner and *Ex-Officio* Justice of the Peace.

Returned and filed Jan. 13, 1921.

A. W. FOX,

U. S. Commissioner.

In the Commissioner's Court for the Precinct of
Ketchikan, Territory of Alaska, Division No.
One.

United States of America,
District of Alaska,
Division Number One.

Affidavit for Search-Warrant.

Fred Handy, being duly sworn, on oath, deposes and says: That he is a Deputy United States Marshal; that on the fifth day of January, 1922, in the Precinct of Ketchikan, District of Alaska, Division Number One, at Ketchikan, Alaska, the crime of manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away or otherwise furnishing alcoholic liquor was committed, to wit, by Jim Simpson and Jerry Simpson.

And this deponent further says that on the fifth day of January, 1922, he watched the premises hereinafter described and occupied by said Jim Simpson and Jerry Simpson, and saw intoxicated men enter and leave said premises; that said [15—4] deponent saw intoxicated men in said hereinafter described premises and saw men deport themselves as under the influence of intoxication. And that he therefore has, and there is just, probable and reasonable cause to believe, and that he states as true, that said Jim Simpson and Jerry Simpson, now have concealed and in their possession and under their control in the following de-

scribed premises, viz., at that certain two-story frame building situated at the southerly end of Front street in the town of Ketchikan, Alaska, and known and designated as the Northern Hotel and Bar and in the lower story of floor thereof and particularly that portion thereof known and designated as the Dory and in said Ketchikan Precinct, alcoholic liquor, all of which is contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the United States of America, and this complainant prays that a search-warrant may issue for the search of said premises, commanding the officer to whom such search-warrant is directed to at once thoroughly search said described premises and the appurtenances thereof, and that if any such intoxicating liquor be found to take into his possession and safely keep the same to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all paraphernalia or part of the paraphernalia of the bar-room or other alcoholic liquor establishment, and any United States Internal Revenue tax receipt or certificate for the manufacture or sale of alcoholic liquors, effective for the period of time covering such alleged offense, and forthwith bring the same before a magistrate to be disposed of according to law and report all the facts to the District Attorney or his deputy.

FRED HANDY.

Subscribed and sworn to before me this 7th day of January 1922.

[Seal]

A. W. FOX,
United States Commissioner and *Ex-officio* Justice
of the Peace. [16—5]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 757—KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY SIMPSON,

Defendant.

Demurrer.

Comes now the defendant in the above-entitled cause and demurs to the complaint (information) herein, and also to the pleadings and proceedings herein for the issuance of the search-warrant and to the return thereon, and for cause of demurrer says that it appears upon the face of said pleadings:

I.

That said complaint (information) did not in said Justice Court below and does not in this court, or at all, state facts sufficient to constitute any crime cognizable by or within the jurisdiction of said Justice Court or this court.

II.

That this cause was not begun upon information

filed by the United States District Attorney, nor upon indictment by any Grand Jury of the Territory of Alaska, and the alleged complaint herein was without authority of law; that said Justice Court below had no jurisdiction over this defendant or the subject matter of the charge against him in said court, and its judgment and the sentence against defendant was and is void for want of jurisdiction.

III.

That this court has no jurisdiction over the person of this defendant in this case, nor over the subject matter of the charge against defendant. [17—6]

IV.

That the search and seizure of defendant's alleged property used as evidence against the defendant in the Justice Court in this case below, and upon which the complaint (information) herein was based, was made and said property seized and used as evidence, upon a search-warrant issued in violation of law, and without probable cause; that said search-warrant did not particularly describe the place to be searched, nor the persons or things to be seized, and said search-warrant and all proceedings connected with its issuance and return, were so issued and taken in violation of law, and the rights of this defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

V.

That the proceedings in the Justice Court below

and the sentence of the Court against this defendant were had and rendered under the supposed authority of the Act of Congress entitled: "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," approved February 14, 1917, 39 Stat. L. 903, and of some law referred to in the pleadings herein as the Alaska Bone Dry Law, Public 308; that said laws were repealed and rendered of no force or validity by the act of Congress entitled "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in development of fuel, dye and other lawful industries," which said repealing act became a law on the 28th day of October, 1919, having on that and the preceding day been passed by the House and Senate of the Congress, by a [18—7] two-thirds vote of the houses voting in the affirmative over the President's veto; that said act of Congress of February 14th, 1917, and said Alaska Bone Dry Law, were also both repealed and rendered void and of no force or validity by the 18th Amendment to the Constitution of the United States.

Dated at Ketchikan, Alaska, February 10, 1922.

JAMES WICKERSHAM and

A. H. ZIEGLER,

Attorneys for the Defendant.

In the District Court for the District of Alaska
Division No. One, at Ketchikan.

No. 757—KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY SIMPSON,

Defendant.

Order Overruling the Demurrer.

The demurrer in the above-entitled cause was called for argument on February 18, 1922, and, after the argument by counsel for plaintiff and defendant, and the Court being fully advised in the premises,

DOTH ORDER, that the said demurrer be, and the same hereby is, overruled, and the defendant is allowed an exception to such order of the court.

Dated at Ketchikan, Alaska, March 1, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska,
First Division. March 1, 1922. J. H. Dunn, Clerk.

Entered Criminal Journal No. 5, page 29.
[19—8]

Proceedings of Court Had May 22, 1922.

Monday, May 22, 1922.

Court met pursuant to adjournment at 10 A. M.

Judge WICKERSHAM.—May it please the Court, before we proceed with this case, there is a motion filed in this case, as there was in the other case, and I desire to make an objection also.

The COURT.—Very well.

Judge WICKERSHAM.—The motion before was to suppress the testimony because of the defects pointed out in the affidavit and in the search-warrant in this case. The Court overruled the motion, so far as the other case is concerned—that is, in the case of the United States *versus* J. B. Simpson, but the Court, as I understand it, in this case, has not passed on it except in that general way in connection with the other case.

The COURT.—Is the motion based on exactly the same state of facts?

Judge WICKERSHAM.—Why I think so.

The COURT.—Similar affidavit?

Judge WICKERSHAM.—Similar affidavit, so Mr. Ziegler says. If the jury could be withdrawn, there is another preliminary matter that could be settled.

The COURT.—Well, the jury may retire.

(Whereupon the jury retired in charge of the bailiff.)

Judge WICKERSHAM.—We desire to have the Court make a formal ruling in the matter, as it did

before, so that we can take an exception to it, and then I want to present another matter.

Mr. ZIEGLER.—I understand the motion to suppress the testimony is identical with the motion in the other case, but I am not sure about that.

The COURT.—The motion will be denied to suppress the evidence at the present time.

Judge WICKERSHAM.—I desire, then, to make a further objection— [20—9]

Mr. ZIEGLER.—(Interrupting.) Pardon me; we take an exception.

Judge WICKERSHAM.—Yes; we take an exception.

The motion is as follows: (Reads:)

“In the District Court for the Territory of Alaska,
Division No. 1, at Ketchikan.

757—KB.

“UNITED STATES OF AMERICA,
Plaintiff,
vs.

“JERRY SIMPSON,
Defendant.

Motion of Jerry Simpson to Suppress Testimony.

“Comes now Jerry Simpson, the defendant hereinabove named, and the jury being duly empaneled and sworn, before the first witness was called or sworn, and before any witness was offered for examination by the prosecution, and objects to any further proceedings in this case or to the introduction of any testimony herein by the prosecution.

“I.

“Because upon its face the complaint upon which this case is based shows that it does not state facts sufficient to constitute a crime, nor sufficient to charge this defendant with having committed any crime.

“II.

“Because all the evidence in this case against this defendant was secured by an unreasonable and illegal search of premises adjoining those occupied by this defendant at the time of the alleged crime, upon a search-warrant issued and served in violation of this defendant’s rights under the fourth Amendment to the Constitution of the United States, because the affidavit upon which said search-warrant was based did not show or pretend to state facts showing any probable cause to believe that this defendant had committed any [21—10] crime or had in his possession any evidence of any crime so committed by himself or anyone else, and because under the said insufficient affidavit a search-warrant was issued authorizing a search on adjoining premises not in the possession or under the control of this defendant, and with which neither he nor his place of business had any connection whatever; and, because all the evidence so found under said affidavit and search-warrant were found thereunder on adjoining premises not described or mentioned in the search-warrant so issued and premises not under the control or management of defendant.

“III.

“Because all evidence in this case was obtained

by officers for the United States, after they had gained possession and control of this defendant's premises, while acting under a warrant which did not in any manner describe or authorize a search of, any premises belonging to or under the management or control of this defendant, and which said officers remained in possession and control of this defendant's place of business, against his protest, after abandoning the search thereof, until such time as a new search-warrant could be obtained, authorizing a search of property alleged to be under the control of this defendant.

“IV.

“Because that part of the Alaska Bone Dry Act which defines the mere possession of intoxicating liquors as a crime is unconstitutional and void, and the Eighteenth Amendment to the Constitution does not vest in Congress the power to punish the mere possession of intoxicating liquors, and the prohibiting of the mere possession of intoxicating liquors is not a valid exercise of the police powers vested in the Congress.

(Sgd.) WICKERSHAM & ZIEGLER,

“Counsel for Defendant.”

[Endorsed]: “Filed in the District Court, District of Alaska, First Division. May 23, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.”
[22—11]

The COURT.—I don't care to hear any argument. What are your statements as to the affidavit based on? What are your statements based upon

in that motion, that the evidence was secured in this case on the first search-warrant? Is there any evidence in the case as to that?

Judge WICKERSHAM.—I don't know what the evidence will be. We think so. You have heard this case before Mr. Ziegler.

Mr. ZIEGLER.—We don't claim that the evidence was secured on the first search-warrant, but we claim that the evidence secured cannot be used, because they gained admission to the defendant's property on the first search-warrant, which did not describe the property and that the officers remained in possession of his premises over his protest—

The COURT.—(Interrupting.) Do you mean to tell the Court that the United States marshal remained in possession of these premises?

Mr. ZIEGLER.—The United States marshal directed certain people to retain possession of these premises until they could get another warrant. That is what we set up in the second motion—that they later came back with another warrant and found the evidence that they intend to use in this case.

The COURT.—Is that a fact?

Mr. MALTBY.—No; it is not a fact, so far as the Government's case is concerned.

The COURT.—You may show that in your evidence in the case.

Mr. ZIEGLER.—We have filed an affidavit stating that that is a fact.

The COURT.—Yes; but the marshal's return is otherwise.

Judge WICKERSHAM.—We note an exception to the ruling of the Court. [23—12]

The COURT.—The motion will be denied.

You may call the jury in.

(Whereupon the jury returned to the jury-box.)

A jury, having been empaneled, accepted and sworn, opening statements were made to the Court and jury by Mr. A. E. Maltby, on behalf of the plaintiff, defendant in error, and by Mr. James Wickersham on behalf of the defendant, plaintiff in error.

Whereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit: [24—13]

Testimony of Fred E. Handy, for Plaintiff.

FRED E. HANDY, called as a witness on behalf of plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. MALTBY.)

Q. Just state your name.

A. Fred E. Handy.

Q. What official position do you hold in the Territory?

A. Deputy United States Marshal.

Q. Stationed at Ketchikan? A. Yes, sir.

Q. I will ask you if you know the defendant, Jerry Simpson? A. Yes, sir.

Q. Were you in Ketchikan on the seventh day of January last? A. Yes, sir.

(Testimony of Fred E. Handy.)

Q. I will ask you if you know where the place called the Dory is? A. Yes, sir.

Q. Where is it?

A. It's on the south end of the street running past the Stedman Hotel and the Revilla Hotel.

Q. In the town of Ketchikan?

A. In the town of Ketchikan.

Q. I will ask you if you ever saw the defendant, Jerry Simpson, in the premises described as the Dory? A. Yes, sir.

Q. I will ask you if you have ever had occasion to go there to examine, to make an examination of the licenses? A. Yes, sir.

Q. Did you make such an examination?

A. Yes, sir.

Q. In whose name did you find the license for the conducting of that business, do you remember?
[25—14]

A. It was in Jerry Simpson's name.

Q. I will ask you if, upon the seventh day of January, 1922, you had occasion to go to the premises that you have just mentioned?

A. Yes, sir.

Q. Under what authority did you go?

A. Search-warrant.

Q. And to whom did you present or read the search-warrant? A. Jerry Simpson.

Q. I will ask you if you read the search-warrant?

A. I read the search-warrant.

Q. I direct your attention, now, Mr. Handy, to the— Well, I'll withdraw that question. How

(Testimony of Fred E. Handy.)

many search-warrants were issued against that place on that day? A. Two against that building.

Q. I will ask you if you proceeded to make a search of the premises under the first search-warrant? A. Yes, sir.

Q. And did you afterwards desist in that search?

A. Yes, sir.

Q. Upon whose advice?

A. District Attorney Maltby.

Q. Upon my advice? A. Yes, sir.

Q. Now, then, after you desisted in searching those premises, did you then leave the premises?

A. Yes, sir; went down to the hotel—Revilla Hotel.

Q. I will ask you who was assisting you in that search at that time.

A. Chief of Police McIntosh and Patrolman McDonald. [26—15]

Q. Any person else at that time?

A. Under the first search-warrant?

Q. Yes. A. That's all; just the three of us.

Q. Just the three of you?

A. No; Dobbs and two customs officials.

Q. Speak up a little louder.

A. The customs officials.

Q. Chief of Police McIntosh, Mr. McDonald, who was patrolman, Mr. Dobbs, Mr. Woodruff, who were the customs officials? A. Yes, sir.

Q. And yourself? A. Yes.

Q. Now, I'll ask you if after desisting in the

(Testimony of Fred E. Handy.)

search under the first search-warrant, if you all left the premises? A. Yes, sir.

Q. You say that you all left?

A. All of us; yes.

Q. Yes. Now, then, I'll ask you if you returned later on to search those premises under another search-warrant? A. Yes, sir.

Q. I will ask you to state whom you saw on going there under your second search-warrant?

A. The proprietor.

Q. Who was that?

A. Mr. Simpson and Jake were there.

Q. To whom did you present the search-warrant that time? A. To Mr. Simpson.

Q. Jerry Simpson? A. Yes, sir.

The COURT.—Speak up louder. [27—16]

Q. Did you proceed to make your search under that search-warrant? A. Yes, sir.

Q. What was the result of your search?

A. About 1,250 bottles of beer.

Q. You seized 1,250 bottles of beer?

A. About that. We got about 1,250 bottles. There were some broken ones.

Q. Who assisted you in that search?

A. Rutherford was additional and Dobbs was called in later on.

Q. Just who was with you?

A. Chief of Police McIntosh and Patrolman McDonald, Rutherford the game warden, Dave Rutherford, and Dobbs later on, after we had found

(Testimony of Fred E. Handy.)

some beer. I met him out in front and called him in to assist.

Q. What became of the beer that was seized in that search?

A. Brought up to the federal jail, federal building.

Q. I will ask you to look at the bottles that are on this table and state what they are and where they came from.

(Witness steps down from stand and examines bottles.)

A. This is supposed to be beer, and this is some of the bottles that were in that—

Q. (Interrupting.) Are these the bottles, or some of the bottles, that you found and seized?

Judge WICKERSHAM.—Now, I object to counsel's leading the witness.

Mr. MALTBY.—I'm not leading him.

The COURT.—Yes; objection sustained.

Q. Well, where did you get these bottles? Where did this stuff come from?

A. Come from the storeroom of the Dory. [28—17]

Q. Under what search-warrant?

A. Under the second search-warrant.

Q. Under the second search-warrant. And in whose possession have these bottles been since that time?

A. In the marshal's possession.

Q. In the marshal's possession?

A. In my possession.

(Testimony of Fred E. Handy.)

Q. I will ask you to look at these two bottles (indicating) and state what, where they came from?

A. These (examining) are two of the bottles that were taken out and marked—taken from the bunch of bottles that were seized.

Q. From the Dory? A. From the Dory.

Q. Now, at the time that you made this search, did you see Mr. Jerry Simpson, the defendant, at any time? A. Yes, sir.

Q. Where was he in reference to the place that you were searching?

A. He was in there the biggest part of the time.

Q. In there the biggest part of the time. Just state to the jury what place or places you searched under that search-warrant?

Judge WICKERSHAM.—Now, I object. I think the search-warrant ought to be produced. The search-warrant is the best evidence. The search-warrant and return are provided for by law and we object to any testimony in respect to them without they produce them before the jury.

The COURT.—Objection overruled.

Judge WICKERSHAM.—Exception.

The COURT.—(To Witness.) You may state what places you searched. [29—18]

A. I searched the back room, the big storeroom, which has a lot of wood in, and some tables and barrels of soft drinks—a general storeroom, and in the back end of that was a nailed-up—there was a piece of beaver board over the door and some other boards, and I tore that off and went back

(Testimony of Fred E. Handy.)

farther and found twenty sacks of beer in the back room, where an addition had been built on.

Q. Now, was Mr. Jerry Simpson, the defendant, present at that time?

A. Yes, he was present. He was in the store-room. He wasn't in the back room at the time.

Q. Did you search this storeroom that you speak of?

A. McIntosh and McDonald— I was present when they were moving wood and discovered the first bunch of beer.

Q. Did Mr. Simpson make any objections to your searching the storeroom?

A. He protested when I asked for the— I asked the Jap whose place this was, and the Jap said it was Jerry's, and I asked Jerry to open the door and he said, "Well, it's not mine. I protest," and I said, "Jerry, I'm going to go in there. If you want to save the door, all right." "Well," he said, "if you'll let one of the officers go with me, I'll get the key"; and so he and Mr. McIntosh went and got the key and he opened the door himself voluntarily—not voluntarily, but under protest.

Judge WICKERSHAM.—Now, I object to that statement, may it please the Court and move to strike it out.

The COURT.—What part?

Judge WICKERSHAM.—That part in which he says that he protested and objected to it, and so forth. He's drawing a conclusion. He doesn't state any fact. [30—19]

(Testimony of Fred E. Handy.)

Mr. MALTBY.—Well, as I understand the witness, if your Honor please, he said that the defendant protested to him in the opening of the storeroom.

The COURT.—Objection overruled. He may state what he said.

Q. State what the defendant said?

Judge WICKERSHAM.—Exception.

A. He said, "If you'll let one of the officers go with me, I'll open it, under protest."

Q. Did he go with the officer?

A. Yes, sir; he and Mr. McIntosh.

Q. Did he afterwards come back?

A. He come back and unlocked the door himself.

Q. He unlocked the door himself?

A. Yes, sir.

Q. And in whose presence did he unlock the door, if you remember?

A. McDonald and myself and McIntosh, and I think Rutherford was present at the time he opened the door.

Q. Did you then search the storeroom?

A. Yes, sir. McDonald and McIntosh moved the wood and found—I was one of the parties that helped to search.

Q. What did you find in the storeroom?

A. We found beer in three different places under the wood-pile; I think about twenty and some odd sacks.

Q. Twenty and some odd sacks under the wood-pile?

(Testimony of Fred E. Handy.)

A. Yes; I wouldn't be positive as to the number of sacks. I know it was six sacks in one place and I think 18 in another, as near as I can remember.

Q. Now, did you see the defendant Jerry Simpson at any other time during this search in that part of the building that you were searching? [31—20]

A. Yes, sir.

Q. And did you see him doing anything?

A. He came in there after a scuttle of coal.

Q. Did you see him get the coal? A. Yes, sir.

Q. Did you see him leave that part of the building where you were searching, with the coal?

A. Yes, sir.

Q. In what direction did he go?

A. He went into the Dory—out of the storeroom and around.

Q. Did he afterward come back again?

A. Yes, he came back after that.

Q. What did he do, if anything, when he returned?

A. Well, he stood there and watched the officers in the search.

Q. Did he say anything after his return?

A. Well, just one time, about a few minutes before we were through searching, he told McDonald and McIntosh, in my presence, "Well, I see you're going to get it, so I'll show you an easier way to get it"; so he picked out a bunch of slabs out of the part of the wood that was corded up—part of the wood was corded up—and he pulled out a lot of slab,

(Testimony of Fred E. Handy.)

or directed them, I don't know which one of them, and took out a bunch of slabs.

Q. And after his directing the officers, what did he do? Did you see them get anything from under the wood-pile? A. Yes, sir.

Q. What did you see?

A. There was a number—I wouldn't say just how many sacks, but there were some sacks of beer brought up from under that.

Mr. MALTBY.—That's all. [32—21]

Cross-examination.

(By Judge WICKERSHAM.)

Q. Mr. Maltby, what time of the day was it that you first went down with the first search-warrant?

Mr. MALTBY.—Excuse me, Judge, but I'm not on the witness-stand.

Q. Did I call him Mr. Maltby? Well, I meant Handy. A. I think about two o'clock.

Q. How long did you remain down there that time, under the first search-warrant?

(Witness hesitates.)

Q. Oh, not exactly.

A. I would say an hour; possibly an hour and a half. I don't know. Time in a case of that kind is hard to keep track of.

Q. Then, what did you do?

A. On the first search-warrant, I called the District Attorney down on his advice, we desisted from searching any farther.

Q. Where had you searched under that first search-warrant?

(Testimony of Fred E. Handy.)

A. I searched behind the bar and then the little two rooms back. One is a kind of bar-room, where they had a table—

Q. (Interrupting) Now, with reference— I'll ask you this question: with reference to the front of the Dory, where had you search backward?

A. Straight back.

Q. Straight back. You hadn't searched in that part of it under the roof of the Northern during that time? A. No.

Q. Just searched straight back. And you think that took you an hour? [33—22]

A. Well, I would think about an hour.

Q. Then you left there, under that first search-warrant, about three o'clock?

A. Possibly later; possibly four or three-thirty; something like that—four o'clock. I wouldn't say exactly the time.

Q. How long after you left then, did you get the second search-warrant?

A. Just as quick as Mr. Maltby could make it out.

Q. Where did Mr. Maltby make it out?

A. Up at the courthouse.

Q. Had you telephoned to him?

A. No, he was down there.

Q. You telephoned to him to come down there?

A. Yes, under the first search-warrant.

Q. Yes. And he came down and examined the first search-warrant?

A. Yes. I don't know as he examined the first search-warrant at the Dory, but he advised me to stop searching.

(Testimony of Fred E. Handy.)

Q. Then, you say you all left? A. We all left.

Q. How long were you gone?

A. Oh, I don't think we were gone over fifteen minutes—ten minutes.

Q. Were you gone ten minutes?

A. I think we were.

Q. You think you were all gone ten minutes?

A. Well, ten or fifteen minutes.

Q. Now, isn't it true that in the testimony which you gave before the commissioner in this case, you testified as follows: "I asked Mr. Maltby for another search-warrant, and he said he would get it, and he did. We stayed there—the police force and myself, and then later, when I searched the store-room [34—23] in back of the Northern, I found five different bunches of sacks, containing about 1,250 bottles of Canadian beer. Some of it was under the wood-pile? Didn't you testify to that?

A. Yes, I guess I did. I testified that we were there.

Q. Well, you testified "we stayed there"?

A. No; we didn't stay in the building all the time; no.

Q. But you testified that in the other case?

A. I wouldn't be positive that I testified just that way.

Q. You are positive you didn't?

A. I am not positive that I didn't; no.

Q. But you don't think you were gone longer than ten minutes? A. About ten or fifteen minutes.

Q. And all the officers were gone during that ten or fifteen minutes?

(Testimony of Fred E. Handy.)

A. They were all gone as long as I was, because we all went back together.

Q. Where did you go when you left there?

A. Went up to Revilla Hotel.

Q. The Revilla Hotel? A. Yes.

Q. That is about two hundred feet away?

A. Oh, about that; yes.

Q. And then returned; as soon as Mr. Maltby came back with the other warrant, you resumed your search?

A. No, I came up and got the search-warrant.

Q. Oh, you came up and got the search-warrant?

A. Up to the courthouse.

Q. Isn't it true you didn't come back with the second search-warrant for about three hours after you made the first examination? [35—24]

A. It isn't true.

Q. It isn't true? A. No.

Q. Well, you say you remained there about two hours under the first search-warrant?

A. Well, an hour to an hour and a half, I said. I wouldn't be positive as to the time under the first search-warrant.

Q. And you didn't search anything during that period, except that portion of the Dory back of the front of the Dory?

A. Not under the first search-warrant.

Q. Not under the first search-warrant. Now, that consists of one large front room and two smaller rooms in the rear, does it not?

A. Yes, sir.

(Testimony of Fred E. Handy.)

Q. And they were open?

A. No; they were locked.

Q. No, I am not talking about the two rooms in the rear of the Northern; I am talking about the rooms in the Dory, behind the front of the Dory, or rather back from the front of the Dory.

A. One of the rooms was a bar-room and it was locked up.

Q. And you were there about an hour and a half?

A. About that.

Q. And you were gone about ten or fifteen minutes before you resumed the search?

A. About that.

Q. And you were not sure whether you said, Mr. Handy, in this case, before the commissioner, that you and the police force remained there?

A. What did you say?

Q. I said, and you are not sure that you said, in your testimony before the commissioner, in this case, that you and [36—25] the police force remained there during that period?

A. We were about the building.

Q. I said, you are not sure that you testified to that?

A. No, I'm not sure that I testified to that.

Q. Well, you are not sure that you didn't, are you? A. No, I wouldn't be—

Q. (Interrupting.) I will ask you to just read that portion of your answer there (handing document to witness) opposite the marked place and see

(Testimony of Fred E. Handy.)

if that recalls your testimony to you before the Police Commissioner, or magistrate.

A. (After reading.) That is about what I testified.

Q. That is about what you testified. We have read that into the record. Now, when you went back with the second search-warrant, you left that part of the premises immediately back of the front of the Dory did you not and made a search under the roof of the Northern, the adjacent building?

A. Yes, sir; we searched the rooms that we had not already searched.

Q. Yes, but under the roof of the Northern?

A. Yes, sir.

Q. They were not under the roof of the Dory?

A. No, but they were connected.

Q. They were immediately back of the front of the building known as the Northern, isn't that true? A. Back of the front; yes.

Q. They were under the roof of the Northern, were they not? A. Yes, sir.

Q. Now, immediately back of the Northern, isn't it true that there are two small buildings?

A. Connected. [37—26]

Q. With the Northern? A. With the Northern.

The COURT.—With the Northern Building?

WITNESS.—Yes.

The COURT.—You must make a distinction between the Northern Building and the Northern.

Q. Is there a Northern Building there and the Northern, or isn't it just one building?

(Testimony of Fred E. Handy.)

A. There's two buildings joined. The Dory and the Northern Building are joined and there's doors running through in two or three or four different places.

Q. Where are those doors?

A. There is one over to the further end of the building.

Q. Did you ever go through that place at the further end of the building—that door connecting the two buildings there? A. Yes, sir.

Q. How far is it from building to building at that point?

A. From building to building—they're practically one building; that is, it's all boxed up, so that you are going from one room into another one.

Q. Yes, but the north wall of the Northern is how far from the main south wall of the Dory at that place? Isn't there considerable space between them right there?

A. It is not visible from the inside, to tell just what the space is.

Q. You have been through there?

A. I searched in between the walls.

Q. So, it is wide enough to search in there?

A. Since this search has been made—

Q. (Interrupting.) Then you know that there is about two feet [38—27] from the north wall of the Northern to the south wall of the Dory, don't you—two or three feet at that place?

A. At the place that I went through?

A. Yes; in the front part?

(Testimony of Fred E. Handy.)

A. In the front part, yes, there's a door which opens out of the forward end of the Dory to the stairway that goes upstairs.

Q. And the buildings are two or three feet apart at that place, aren't they, but walled up so that you pass through from one into the other?

A. Yes, sir; they are walled up.

Q. Now, down where the bar is, isn't it true that there is a space cut into the south wall of the Dory at that place and that the north wall of the Northern is back of the bar? Do you remember that situation?

A. The lunch-counter or the bar?

Q. Under the lunch-counter; yes.

A. There is a space in there, under it, I think—the space runs against that one building and opposite into the Northern Building.

Q. Is it the same width there that it was in front?

A. I think it is; yes; about the same.

Q. Now, back where the water-closet is, which was used both from the Dory and from the Northern by an entrance from each side, isn't that water-closet within the space between the Dory and the Northern?

A. I believe the water-closet itself is; yes.

Q. It is in that space? A. I believe it is.

Q. Yes. And there is an opening from the Dory into that water-closet and also an opening from the other side, from the [39—28] Northern into that water-closet? Isn't that true? A. Yes, sir.

Q. Now, this big room that you say you searched,

(Testimony of Fred E. Handy.)

where you found the beer, or part of the beer, is under the roof of the Northern? A. Yes, sir.

Q. And is not under the roof of the Dory at all?

A. It is not under the roof of the building which the Dory sign is on.

Q. That's what I mean. But there is a door through back there, you say?

A. Yes; there are two or three doors; there's two or three, I wouldn't say—a couple of them.

Q. Now, wasn't that big door which you were talking about, just to the east of the water-closet, solidly nailed up when you went there to make that search? A. Yes; it was nailed up.

Q. Now, there was another door back there, opening into Jake's room, farther back?

A. There was a door there; yes.

Q. Now, there was another side door from the Dory in the back, in the alley, or into the alley, back of the Dory, isn't there? A. Yes, sir.

Q. In other words, the Dory ran full length of the lot from Front Street back to the alley, the same width that it has on its frontage, isn't that true?

A. Yes, I think so.

Q. And isn't it true that the Northern ran the full width of these two cabins which are attached to the back of the Northern to the alley? [40—29]

A. Yes, sir.

Q. The Northern is a two-story building?

A. Yes.

Q. And the Dory is a one-story building?

(Testimony of Fred E. Handy.)

A. A story, or story and a half. I think it is one story.

Q. There is an upstairs to it?

A. No; I don't think so.

Q. You didn't search any upstairs in there?

A. No; I didn't find a way to get up.

Q. Now, in this room, back of the Northern, where you found this beer under the wood, who do you say produced the key to that?

A. Jerry Simpson.

Q. Jerry Simpson. You made a demand for the key?

A. I didn't make a demand. I told him that if he wanted to save the door that he could unlock it—that I was going in there and search.

Q. What did he say?

A. He said, "If you'll just let one of the officers go with me, I'll get the key."

Q. Where did they go?

A. They went back into the other building, back through the toilet. I don't know where they went to.

Q. You don't know where they went to of your own knowledge? A. No.

Q. But they brought the key back?

A. Yes. McIntosh was with him.

Q. McIntosh was with him and they brought the key back? A. Yes.

Q. And then you went into the storeroom with the key?

A. He opened the door and I went in. [41—30]

(Testimony of Fred E. Handy.)

Q. Now, did you get into Jake Saunders' room at any time, at the rear of the Northern?

Mr. MALTBY.—I object to that as incompetent, irrelevant and immaterial and not cross-examination.

Judge WICKERSHAM.—Oh, yes, it is. He said they found beer in there.

The COURT.—Yes.

Mr. MALTBY.—There is nothing in the evidence so far to show that they got into Jake Saunders' room.

The COURT.—Yes, I think, Judge Wickersham, you better call his attention to the situation of the room.

Judge WICKERSHAM.—I'll offer a map for identification, may it please the Court, of these buildings. It was offered below. I ask to have it marked in this case for identification.

The COURT.—Mark it No. 1 for identification. Is there any designation on it?

Judge WICKERSHAM.—Yes; I'll show it to the Court first.

Mr. ZIEGLER.—It was an exhibit in the lower court.

The COURT.—(After examining map.) No evidence can be given—cannot be taken in evidence with those marks and the designations on it. It cannot be taken as part of the evidence.

Judge WICKERSHAM.—No; I was just going to ask about the location of these rooms.

The COURT.—Oh, yes.

(Testimony of Fred E. Handy.)

Judge WICKERSHAM.—I was just going to ask him about the location of these rooms.

Q. Can you understand this, Mr. Handy (handing map to witness)? Here is Front Street marked here and this is Mill Street marked here on the side. This is drawn to represent the Northern and this the Dory. Now, I want to ask you about the location of Jake Saunders' cabin back there. Do you [42—31] know where that is without any reference to the map?

A. Jake Saunders' cabin is not in sight. It is in the corner of this building (indicating).

Q. You are sure about that?

A. I am not sure, but it is the room he claimed.

Mr. MALTBY.—Now, if the Court please, we'll object to any evidence as to Jake Saunders' room for the reason that it is incompetent, irrelevant and immaterial and not cross-examination.

Judge WICKERSHAM.—Oh, well—

Mr. MALTBY.—(Continuing.) And doesn't prove any of the issues in this case.

Judge WICKERSHAM.—Only this: they have testified to finding beer in these rooms and I am trying to get them located.

The COURT.—Well, he has testified as to finding beer in the room back of the storeroom where the wood was.

Judge WICKERSHAM.—Yes; this is the room back here, one of them.

The COURT.—Now, you can ask him in what room they found it.

(Testimony of Fred E. Handy.)

Q. Now, with respect to finding beer in the room back of the woodshed or place where you found the beer, where else did you find the beer—part of this beer that you have here?

A. Besides what we found—

Q. Yes, besides what you found in what is called the wood and storeroom here.

A. In this room (indicating).

Q. In this room marked what?

A. It isn't marked.

Q. Marked Harry Wiley's cabin.

A. In the back room? [43—32]

Q. Yes, in the back room. Now, how much beer did you find there?

A. About twenty sacks there in one pile. I don't think this map is correct.

Q. I show you this picture (handing picture to witness). Can you locate that room on that picture, on that photograph?

A. I can tell about. It's the room in from this door, directly back, straight in from this door.

Q. How far back from that door?

The COURT.—Mark it with an A.

Q. Mark the door that you are talking about with an A.

(Witness does so.)

Q. Now, how far back from that door did you find the beer?

The COURT.—You better have that picture marked for identification.

(Testimony of Fred E. Handy.)

A. It was the width of the room. I wouldn't be sure.

Q. It was in the room to which this was the door?

A. Yes, sir.

Q. Now, we offer this photograph, may it please the court, for identification and ask to have it marked.

(Photograph received and marked for identification.)

Q. How many bottles of beer did you find in that room—that is this room right here (pointing) on the corner? A. Twenty sacks.

Q. Two or three sacks. A. Twenty sacks.

Q. Oh, twenty sacks? A. Yes.

Q. How many bottles in each sack?

A. I couldn't say. When I got them up here the next morning, [44—33] I emptied all the sacks and counted the bottles.

Q. How did you get through this door from the wood and storeroom into this cabin?

A. This door had a big sheet of beaver board—

Q. (Interrupting.) Mark that door B, won't you?

(Witness does so.)

A. (Continuing.) —nailed over the door, coming into this room. I noticed the beaver board and I took an axe and pried— I think there were some other boards there, too, to hold the beaver board up—

Q. (Interrupting.) How high was this beaver board above you?

(Testimony of Fred E. Handy.)

A. It was, I think, down through the floor. I wouldn't be positive. I think it covered, completely covered the door.

Q. Wasn't crosswise of the door?

A. No; I know it wasn't crosswise.

Q. Now, you say you found twenty sacks of beer in there, in this room that you spoke about?

A. Yes, sir.

Q. Now, did you find any other beer at the rear of the Northern in this other building known as Jake Saunders' cabin?

A. Jake Saunders' cabin? It seemed to me that Jake Saunders' room was in the corner of this building.

Q. Did you find any beer in it?

A. No, we didn't find any beer in it.

Q. What did you find in there?

Mr. MALTBY.—We object, if the Court please, what they found. They didn't search it under the second search-warrant.

Q. Did you find any intoxicating liquor there?

Mr. MALTBY.—We object, if the Court please, as irrelevant, incompetent and immaterial.

The COURT.—Yes, I think so. [45—34]

Judge WICKERSHAM.—Now, the purpose is to show that this beer and all this intoxicating liquor all belonged to this other man, Jake Saunders.

Mr. MALTBY.—Now, the witness has stated that they didn't find anything under the second search-warrant and that is what we're proceeding under.

Mr. ZIEGLER.—But, in that connection, if the

(Testimony of Fred E. Handy.)

Court please, this witness has testified all about acting under the first search-warrant. Now, I don't think that he should be permitted to testify to a part of his actions and then have the court protect him with reference to the rest of his actions under that search-warrant. He says he met with resistance, that his man protested and they got another warrant. Now, I think that he ought to be permitted to tell about the whole transaction under that first search-warrant if he is to testify in regard to any of them.

The COURT.—I don't think so. I sustain the objection.

Mr. ZIEGLER.—We take an exception.

Judge WICKERSHAM.—Exception.

Q. Now, with respect to finding beer under the second search-warrant, did you find any beer back under the main building of the Northern except that which you found in Wiley's cabin?

A. Yes, there was another room in which we found three sacks, I think.

Q. Where is that room, if you can point it out on this chart? A. This room here.

Q. Mark that C, right in the middle of it.

A. Right there (marking as directed).

Q. Now, I call your attention again to this photograph which has [46—35] been filed here for identification, marked Defendant's Exhibit No. 2, and ask you if there isn't a second door to that room connecting the Northern Building?

(Testimony of Fred E. Handy.)

Mr. MALTBY.—We'll object, if the Court please, as irrelevant.

Judge WICKERSHAM.—We want merely to locate where he found this beer, that's all.

The COURT.—He may answer. Objection overruled.

A. We gained admission to that room through another door adjoining the Northern Building.

Q. Yes, I know.

A. We never used this door (pointing).

Q. Let me ask you this question—

A. (Interrupting.) This door was never unlocked.

The COURT.—He asked you if there wasn't a second door?

The WITNESS.—Yes.

The COURT.—(Continuing.) Entering from that side of the alley.

The WITNESS.—From that side of the alley?

Q. From that side of the street.

The COURT.—From that side of the street.

Q. You marked the first one with an A, did you not? A. Yes.

Q. Mark the second one.

A. The other door to this room was inside of the building.

Q. But on the outside. There was two doors there, Mr. Handy, on the outside.

A. I never noticed any in the building.

Q. But it's there.

(Testimony of Fred E. Handy.)

A. It shows on the outside, but I don't believe it shows from the inside. [47—36]

Q. Mark that second one D.

Mr. MALTBY.—We object to that unless he knows.

A. Well, I don't know, except from that photograph.

Q. Then, if you don't know, you don't swear to it, of course. But there are two rooms, are there not, in that back building where you found the twenty bottles of beer?

A. Yes, there's two rooms.

Q. What was in this room next to the Northern Building?

A. As I said, there was, I think, three sacks.

Q. Three sacks in that?

A. In this room (indicating).

Q. Where you found the beer.

Mr. MALTBY.—Just what room was that?

Judge WICKERSHAM.—It was in that room C, that you marked here.

A. It was in this room marked C.

The COURT.—C.

Judge WICKERSHAM.—Room C marked on this map.

Q. Now, you found three sacks of beer there?

A. Yes.

Q. What kind of sacks were they?

A. Oh, just gunny-sacks.

Q. What kind of sacks did you find in this wood and storeroom? A. Gunny-sacks.

(Testimony of Fred E. Handy.)

Q. All alike?

A. Well, practically alike; not all exactly alike.

Q. Was there any difference in the beer that you found in the Wiley cabin and what you found in this wood and storeroom?

A. I couldn't say as to that.

Q. It wasn't all Canadian beer?

A. All the beer that was seized was all Canadian beer. [48—37]

Q. It was? A. Yes.

Q. Now, let's come back to this wood and store-room. The day that you were there, what was in that storeroom? There (indicating) is the store-room. Now, you tell the jury as fully as you can everything that was in that storeroom at that time.

A. There was a big pile of wood which run up pretty near to the ceiling, and piled up on one side. Then there were some barrels of soft drinks of several kinds; and I think there was a card-table, pool-table, up agin the wall.

Q. Counters and trunks?

A. Yes, I believe there was a trunk, one trunk, up in the corner.

Q. What else can you remember that you saw there? A. I can't recall just now.

Q. It was pretty full of all this kind of material, wasn't it?

A. Along one side there was a little stuff that looked like the stuff that they use in a bar-room.

Q. It was evidently used as a wood and store-room? A. It was used as a wood and storeroom.

(Testimony of Fred E. Handy.)

Q. You say there was coal in there?

A. Yes; there was coal in one corner.

Q. See any old tables in there?

A. Saw a card-table and a billiard-table.

Q. How many billiard-tables did you see in there?

A. Well, I'm not sure.

Q. Weren't there three? A. I couldn't say.

Q. Don't you know that two of them have been taken out since and taken to the Elks? [49—38]

A. I don't know.

Q. Do you know whether they were knocked down or set up, ready for use?

A. Oh, no; they weren't set up for use. I'm not positive about the billiard-table, but it was a part of a billiard-table, some part of it.

Q. And a large amount of other material that you haven't mentioned?

A. Well, there wasn't such a great deal.

Q. There wasn't such a great deal? The room was pretty full of this stuff, wasn't it?

A. Full of wood; I would say ten or fifteen cords of wood in there.

Q. What sort of wood was it? A. Slab wood.

Q. Slab wood. How long was it sawed up?

A. Different lengths. I would say from fourteen to 22 inches in length; maybe 24—different lengths.

Q. Do you know what business was conducted immediately in front of this wood and storeroom, Mr. Handy? North of the wood and storeroom, where did you come into?

(Testimony of Fred E. Handy.)

A. Came into the hallway?

Q. Into the hallway? A. Yes.

Q. About how wide was that hall?

A. Oh, four or five feet.

Q. And then immediately across from the door that you come out into that hall, was there another door? A. Yes, sir.

Q. Where did that take you?

A. Into the noodle joint.

Q. The noodle joint? [50—39]

A. The Jap's.

Q. Do you know whether the Jap had any wood in there or not, or any things?

A. I don't know anything about that. He claimed that it wasn't his storeroom.

Q. He claimed it wasn't his storeroom?

A. No.

Q. But you don't know whether he had any material or truck of any kind in there or not?

A. No, I don't know that he didn't have anything in there.

Q. Now, how many different packages—I mean how many different places did you find beer in in those rooms?

A. Those back—the additions or cabins?

A. Yes.

Q. Two.

Q. In two of those rooms at the back of the building you found beer? A. Yes.

Q. That's off the Northern? A. Yes.

Q. And where else did you find it?

(Testimony of Fred E. Handy.)

A. In the wood and storeroom?

Q. Yes, in the wood and storeroom.

A. In the wood.

Q. Were those the only two places that you found any beer in? A. Yes.

Q. Those three rooms?

A. Yes, sir. As I said, I don't believe this map is correct.

Q. You don't believe that map is correct?

A. According to the lower floor of the Dory.

Q. Where do you think that it is incorrect, Mr. Handy? [51—40]

A. In regard to this main building of the Dory, Jake Saunders' room projects out from the main wall, like this (showing on map).

Q. Way out into the card-room back of the Dory?

A. Back of the Dory and this is the room in which Jake Saunders has a bed in and claimed as his room. At that time there was no— It was searched under the first search-warrant, but—

Q. (Interrupting.) Well, now, let me ask you this question: You think this room back here (pointing) marked as Jake Saunders' cabin, extended out into the card-room of the Dory and across that line (pointing)?

A. Jake Saunders' room extended out into the same room, the same as this (indicating) does here.

Q. Yes.

A. And a part of it, anyway, extends out into this main big room of the Dory.

Q. Under the roof of the Dory?

(Testimony of Fred E. Handy.)

A. Yes; under the roof— No, it isn't under the roof of the Dory. Saunders' room is under the shed roof, but apparently looks the same from the inside; that is, part of his room comes out into the Dory.

Q. You think, then, Mr. Handy, that Jake Saunders' room back there is on the left-hand side, on the Dory side, which is the general line that runs between the two buildings? A. A part of it is.

Q. A part of it. Are you sure about that?

A. Yes, I am quite positive of that. This line (indicating), take it from the street, running between the two buildings straight to the rear, the corner of Jake Saunders' room went out into this big room the same as this (indicating) does. [52—41]

Q. It is an offset, you think, of what is marked the "big room, the big card-room" of the Dory?

A. Yes, sir.

Q. You think that? A. Yes.

Q. You feel as well satisfied about that location as you do with the other locations of things you have made here? A. Well, I am positive.

Q. You're positive?

A. Yes; it projects out into the big room.

Q. You think then, that it is on the Dory lot then, the Jake Saunders cabin?

A. A part of it—that is, the cabin, the room that Jake Saunders occupied in which he has a bed and claimed it was his.

Q. You think that's on the Dory lot?

(Testimony of Fred E. Handy.)

A. Yes, sir.

Q. You are sure about that?

A. Yes, sir; I'm sure.

Q. But you are sure the cabin that you have marked here as the cabin C, that is, immediately back of the Northern Building, in back of the Northern, I mean, not back of the Dory?

A. What? The same cabin marked "Saunders' room"?

Q. No, the other one—the one that you marked C, next to the street. Didn't you mark one C there?

A. I think so.

Q. Here (pointing) is Mill Street.

A. Yes; that is back of the—

Q. (Interposing.) That is back of the Dory.

A. The Northern.

Q. I mean back of the Northern. And you say, then, that Jake Saunders' room isn't immediately back of the Northern? [53—42]

A. Not all of it.

Q. Not all of it.

A. I don't believe any of it.

Q. You don't believe any of it?

A. No; his room isn't—the room he occupied.

Q. Were you in that room? A. Yes.

Q. Did you find any beer in there?

Mr. MALTBY.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained. It's been ruled on once.

Judge WICKERSHAM.—It has been ruled on

(Testimony of Fred E. Handy.)

as to the other liquors, but not as to the beer. I asked him if he found any intoxicating liquor there, but as to the beer, I didn't know that the Court had ruled.

The COURT.—Well, any liquor would include beer. The term liquor would include beer.

Judge WICKERSHAM.—It might. I'm not an expert on that. We'll note an exception anyway.

Q. Do you know where this beer here on the table came from?

A. Came from that place. It was among the 1,250 bottles that was seized there.

Q. Do you know whether that beer came from the Wiley cabin that you have marked C or whether it came from the storeroom?

Mr. MALTBY.—We object to that as immaterial.

Mr. ZIEGLER.—I think it is very material, if the Court please.

The COURT.—Yes; objection overruled. It was all mixed up together. [54—43]

Q. I asked you if you knew where that came from, whether it came from the storeroom or whether it came from the Wiley cabin marked C.

A. No, I couldn't be positive which room those particular bottles came from.

Q. You don't know what room those bottles came from? A. No.

Q. Mr. Handy, you say that after you ceased operations under the first warrant, you telephoned to Mr. Maltby and you got a second warrant. Did

(Testimony of Fred E. Handy.)

you come up to sign the affidavit for that second warrant? A. I come up; yes.

Q. Where did you sign it?

A. In the courthouse here; I'm not positive. I think I signed it. He wouldn't give me a search-warrant without I signed it.

Q. Well, I want you to be sure about it. You're thinking now. Don't you know?

A. No; I'm not positive. I was in a hurry at the time.

Q. Isn't it true that you didn't sign that affidavit until after you had completed all these searches?

A. It's not customary—

Q. (Interrupting.) I didn't ask you what was customary.

The COURT.—You can answer that by yes or no.

A. I don't think it was. I don't think that was the case. I don't know, but I am positive I never do that.

Q. If you don't know, that is enough. You say, then, that you don't know whether you signed this affidavit before the warrant issued, or after you got back from the service of the warrant? I don't want you to misunderstand me. The second warrant, I mean. [55—44]

The COURT.—The second warrant?

Judge WICKERSHAM.—Or the second affidavit to the second warrant.

Q. I ask you now if you signed it before the warrant was served and you made that search down there, or after you got back?

(Testimony of Fred E. Handy.)

A. I don't just remember at this time anything about the method.

Q. You say it was ten or fifteen minutes before you returned with the warrant, the second warrant?

A. I didn't say that.

Q. Well, you said you were gone ten or fifteen minutes. A. We left the place.

Q. After the second warrant?

A. After the first warrant, we left the place and was away from the place ten or fifteen minutes.

Q. And then you returned with the second warrant?

A. No, I didn't return with the second warrant.

Q. You returned without the warrant?

A. It was a public place. We went down there quite often.

Q. Oh, I see. How long were you there in that public place before you had the second warrant?

A. I couldn't say.

Q. Two hours? A. Oh, no.

Q. Now, isn't it true that you waited there for two or three hours? A. No; it isn't true.

Q. It isn't true? A. No.

Q. What were you doing?

A. Mac and I were around the building at different places. We figured that there was liquors in there that they might [56—45] try to get them out.

Q. You stayed there?

A. We stayed around the street.

Q. Now, isn't that why you said in your affidavit,

(Testimony of Fred E. Handy.)

in your testimony before the commissioner on the trial of this case below, that "we stayed there—the police force and myself"? Isn't that why you testified that?

A. We didn't stay in the building.

Q. You didn't stay in the building? A. No.

Q. So that what you testified to there wasn't true?

A. We didn't stay in the building all the time. We were in and out.

Q. So I say, that wasn't true, then, what you said there?

A. No, I wouldn't say that it wasn't true.

Q. Who were you there with—you and the police force that you mentioned in your testimony?

A. When we started the second search?

Q. No, during the time that we're talking about now, between the time you quit under the first search-warrant and the time you got the second warrant. Who was there with you?

A. We went back there about fifteen minutes after we quit with the first warrant and we walked in—

The COURT.—(Interrupting.) Well, he asked you who was there with you.

Q. The police force and Rutherford—four of us.

Q. There were four of you? A. Yes.

Q. And you remained there until the second warrant came?

A. No, no; I didn't. I don't know about the others.

(Testimony of Fred E. Handy.)

Q. Where did you remain? [57—46]

A. I was around the building, out in the street.

Q. In and out? A. In and out and around.

Q. Were you up to the courthouse during that time?

A. I was up to the courthouse to get the search-warrant.

Q. During that ten or fifteen minutes that you were gone? A. Oh, no.

Q. Now, when were you up to the courthouse?

A. I was up to the courthouse, come up and got the search-warrant and went right into Jerry Simpson's and proceeded to do the searching. We got it, I said, as quickly as it could be made up. He phoned me when he had it ready.

Q. And then you came up and got it and went back? A. Yes.

Q. Who remained there while you were gone?

A. McDonald and Rutherford were watching the trap where there had been some beer, and I don't know what else, something dropped from the trap when I opened the trap there under the first search-warrant.

Q. They were there under your instructions?

A. We told him that when the tide went out, we were going to get—

Q. (Interrupting.) I said, they were there under your instructions? A. Yes.

Q. And that trap was in the side of the building, wasn't it? A. Yes.

(Testimony of Fred E. Handy.)

Q. And that was before the second warrant came back?

A. Yes, that was before we got the second warrant.

Judge WICKERSHAM.—I think that's all.
[58—47]

Redirect Examination.

(By Mr. MALTBY.)

Q. Now, Mr. Handy, at the time of the first search-warrant, or at the time that you abandoned your search under the first search-warrant, did you and those who assisted you in your search leave the premises that you were then in? A. Yes, sir.

Q. And how long was it before you returned to those premises?

A. I was back there in about ten or fifteen minutes.

Q. You were back in there in ten or fifteen minutes? A. Yes, sir.

Q. What was your purpose in going back?

Judge WICKERSHAM.—Oh, I object. That's immaterial.

Mr. MALTBY.—It seemed to be very material to you a moment ago. You were asking him all about it.

The COURT.—He may answer.

A. My purpose was to wait for the tide to go out and get some beer that had been dropped from a trap or trip that I tripped myself. I unlocked it, in unlocking the door, I pulled the trip and let it fall down on the flats or in the bay, and the tide was

(Testimony of Fred E. Handy.)

in and I wanted to wait until the tide got out. When the tide went out, I wanted to get whatever it was that was on the beach.

Q. Now, then, after you abandoned the first search under the first search-warrant, under my instructions, there was another search-warrant procured, wasn't there? A. Yes, sir.

Q. Now, Mr. Wickersham asked you when you signed the affidavit upon which that search-warrant was procured. He asked you whether it was signed after you received the search-warrant or before you received the search-warrant. Now, state the fact to the jury as to when you signed your affidavit, [59—48] either as to whether it was before you got the search-warrant or afterwards?

A. Well, I don't remember of ever signing an affidavit after the search-warrant—

Mr. ZIEGLER.—We object to that—

Judge WICKERSHAM.—Now, then, I object to that and move to strike it out as not responsive to the question.

The COURT.—He can state.

Judge WICKERSHAM.—Exception.

Q. I show you this affidavit and ask you if that is your signature? A. Yes, sir.

The COURT.—Strike out his last answer as not responsive.

Q. I'll also show you this (exhibiting document) and ask you if you know what that is.

A. Search-warrant.

Q. Issued by whom?

(Testimony of Fred E. Handy.)

A. A. W. Fox, United States Commissioner.

Q. I will ask you if you can identify that paper?

A. Yes, sir.

Q. Whose signature is attached to that paper?

A. Fred E. Handy.

Q. What is it?

A. The return of the warrant by the officer serving the same.

Q. Now, then, this affidavit (showing) the affidavit for the search-warrant which I am showing you now, who is that signed by?

A. Myself, Fred Handy.

Q. When did you sign that affidavit in reference to the issuance of the search-warrant?

A. I signed it before the search-warrant was issued.

Q. You are sure of that? [60—49]

A. I'm sure I never signed any affidavit after the search-warrant was issued.

Q. Now, in the search that you made of these premises, under the second search-warrant, you procured a certain quantity of, or procured some bottled beer in where the wood was piled up in the back end of the building where you were searching, isn't that right? A. Yes, sir.

Q. Now, about how much, or where was that beer that you procured at that particular place?

A. Under the wood-pile.

Q. Under the wood-pile. About how much wood was there piled there?

(Testimony of Fred E. Handy.)

Judge WICKERSHAM.—I object, may it please the Court. Counsel went into that in his main case and we didn't make any cross-examination of it.

The COURT.—Yes, objection sustained as not redirect examination.

Q. But you found beer under that wood-pile, though, didn't you? A. Yes, sir.

Q. Now, just where was that storeroom, where this wood was piled? I think it is described in defendant's plat as the wood storeroom, or something of that kind.

Mr. ZIEGLER.—Wood and storeroom.

Judge WICKERSHAM.—Counsel can have this plat.

Q. Where was that in reference to the main part of the Dory? A. The wood storeroom?

Q. Yes.

A. It was in the—it was right by the side of the Dory Building. It was right on the south side of the Dory Building.

Q. Was Mr. Simpson in there with you when that beer was taken from under the wood-pile? [61—50]

Judge WICKERSHAM.—Now, may it please the Court, I object to this line of questioning.

Mr. ZIEGLER.—It is not redirect examination.

The COURT.—Oh, you have already gone into that. It has been answered as to whether he was in there on your redirect, on your direct examination, you asked him.

(Testimony of Fred E. Handy.)

Q. Now, this particular storeroom that counsel has asked you about on cross-examination, and which he described, I think, as Jake Saunder's room, who opened that room for you?

A. Jake Saunders opened his own room.

Q. His own room? A. Yes.

Q. Now, then, this room known as the storeroom, who opened that room for you?

A. Jerry Simpson. The big storeroom.

Q. The big storeroom. And how did he open it?

Judge WICKERSHAM.—Now, may it please the Court, we object. That's not cross-examination. That's all been gone into.

The COURT.—Yes, Mr. Maltby.

Mr. MALTBY.—It was all brought out again on cross-examination.

The COURT.—No, he didn't ask him anything about that—who opened the door, at all. The examination was as to the location of rooms, where the doors were situated and where the different rooms were situated and where the beer was found in the different rooms.

Mr. MALTBY.—That'll be all.

Judge WICKERSHAM.—That's all.

(Recess until 3:45 P. M. this day.) [62—51]

Testimony of T. W. McDonald, for Plaintiff.

T. W. McDONALD, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. MALTBY.)

Q. Your name is T. W. McDonald?

A. Yes, sir.

Q. Do you live in Ketchikan, or were you living in Ketchikan on the seventh day of January last?

A. Yes, sir.

Q. What position did you hold at that time?

A. City patrolman, night patrolman, Ketchikan.

Q. Do you know the defendant, Jerry Simpson?

A. Yes, sir.

Q. Do you know Fred E. Handy, deputy United States marshal? A. Yes, sir.

Q. Do you know Lonnie McIntosh?

A. Yes, sir.

Q. State, if you know, what position Mr. McIntosh held on the seventh day of January, 1922?

A. Chief of Police in Ketchikan.

Q. I will ask you if you know where the building or place known as the Dory is? A. Yes, sir.

Q. Where?

A. On the south end of Main street, on the left-hand side going down.

Q. In the town of Ketchikan?

A. Ketchikan, yes, sir.

Q. I will ask you if you had any occasion to go

(Testimony of T. W. McDonald.)

to the Dory officially on the seventh day of January, 1922? A. Yes, sir.

Q. What was the purpose of your visit there?
[65—54] A. To search the building.

Q. And did you make a search of the premises, or assist in making the search of the premises at that time?

A. Yes, sir; I assisted Deputy Marshal Mr. Handy.

Q. I will ask you, Mr. McDonald, if you know how many search-warrants were issued for that building on that day? A. Two.

Q. I will ask you if you worked with Mr. Handy, the Chief of Police and others under the first search-warrant? A. Yes, sir.

Mr. ZIEGLER.—If the Court please, I would just like to make the formal objection that all these questions are very leading. He was an officer that day, and let the counsel ask him as to what he did, and not lead him.

The COURT.—I think it is preliminary. He simply asked him if he assisted. Now, he can state what he did under the first search-warrant.

Q. Now, I understood you to say that you assisted under the first search-warrant?

A. Yes, sir.

Q. Do you know whether or not the search under the first search-warrant was abandoned or not?

Judge WICKERSHAM.—Now, I object, may it please the Court. Let the witness testify.

(Testimony of T. W. McDonald.)

The COURT.—Ask him if he knows.

A. Yes, sir; I know that it was abandoned.

Q. I will ask you, Mr. McIntosh, I will ask you Mr. McDonald, if after the abandonment of the first search-warrant, you and the rest of the officials left the building? A. Yes, sir; we left.

Q. I will ask you how long after you left the building before [66—55] you went back again, if you did go back?

A. It was pretty close to an hour.

Q. Pretty close to an hour? A. Yes, sir.

Q. When you returned to the building, did you return under a search-warrant or not?

A. No, sir.

Judge WICKERSHAM.—Well, now, I object to that. Don't get so swift. When there is an objection, wait. I object, may it please the Court. That is leading again.

The COURT.—Yes, I think so.

Q. Why did you go back, Mr. McDonald?

A. The deputy marshal told Rutherford and I to go back.

Q. When did you return?

A. About an hour after we went back there for the purpose of—

Judge WICKERSHAM.—(Interrupting.) Now, I object to that. He can testify.

Q. What was your purpose in going back?

A. To wait for the tide to go out.

Q. Why were you waiting for the tide to go out?

(Testimony of T. W. McDonald.)

A. We thought there was some liquor underneath the building.

Q. That was a continuation of the search—

Judge WICKERSHAM.—Now, if the Court please, I object to that.

Mr. ZIEGLER.—That is a question of law and not a conclusion for him to draw.

Mr. MALTBY.—Well, you were saying it so everybody could hear, so I thought I'd ask him.

Mr. ZIEGLER.—I didn't intend to, Mr. Maltby.

Q. Now, Mr. McDonald, did you again leave the building? A. No; we didn't leave. [67—56]

Q. Did you assist in the second search that was made under the second search-warrant?

A. Yes, sir.

Q. Who else assisted in that search, if you know?

A. Deputy Marshal Fred Handy, Chief of Police Lonnie McIntosh and the game warden, Dave Rutherford.

Q. Were you there at the time— I will ask you this question first: Who presented the search-warrant? A. Deputy Marshal Fred Handy.

Q. Were you there when he presented it?

A. Yes, sir.

Q. To whom did he present it?

A. To Jerry Simpson.

Q. To Jerry Simpson. What did you do in the assisting under that second search-warrant?

A. We searched the premises.

Q. What was found?

(Testimony of T. W. McDonald.)

A. Sixty sacks of beer.

Q. Do you know what became of that beer?

A. Yes, sir.

Q. What?

A. It was taken up to the courthouse by the marshal.

Q. Did you, in assisting under the second search-warrant, uncover or— Well, I'll withdraw that question. Counsel will think it's leading. Did you, in assisting under the second warrant, find any beer? A. Yes, sir.

Q. Where did you find it?

A. Underneath some wood in the storeroom.

Q. Where was that in reference to the bar in the Dory?

A. Well, it was to the rear of the Dory, the building where the bar is, and then to the right. [68—57]

Q. Was Mr. Jerry Simpson, the defendant, present at any time during the search? A. Yes, sir.

Q. And was he present at this particular place where you found this beer? A. Yes, sir.

Q. What, if anything, did Mr. Jerry Simpson, the defendant, do or say while you were searching for this beer?

A. In the first place, he protested against us going in.

Q. Yes.

A. And the deputy marshal asked him if he owned the place and he says "No," and then he

(Testimony of T. W. McDonald.)

asked the Japanese that was there who owned the place, who owned the room—

Judge WICKERSHAM.—Now, I object to what the Jap said.

A. He—

Judge WICKERSHAM.—Now, wait a moment. I object to what the Jap said.

The COURT.—Yes. You needn't state what the Jap said—simply hearsay.

Q. Now, who assisted you at this particular place to make this search?

A. The Chief of Police.

Q. Mr. McIntosh? A. Yes.

Q. What were you doing?

A. We were uncovering the beer that was underneath some wood.

Q. What were you doing with reference to the wood. A. Throwing it to one side.

Q. Throwing it to one side. Was Mr. Jerry Simpson, the defendant, present at that time?

A. Yes, he was there most of the time, in and out. [69—58]

Q. Did Mr. Jerry Simpson say or do anything while you and Mr. McIntosh were taking down this wood? A. Yes, sir.

Q. What?

A. We was throwing the wood off the top and it was a lot of work and he said, "Well, you've got me anyway; I'll show you an easier way to get at that," and he showed us the combination.

Q. What was the combination?

(Testimony of T. W. McDonald.)

A. Several slabs of wood were nailed together and we just pulled them out to one side, and there was a kind of a trap in there and we found three or four sacks of beer in there.

Q. And he stated to you, "You've got me anyway"?

Judge WICKERSHAM.—Now, I object to counsel's repeating it.

The COURT.—He can answer.

Judge WICKERSHAM.—Let the witness say.

Q. And he stated to you, "You've got me any—and I'll show you an easier way to get at it"?

The COURT.—You can ask him what he did say.

A. "You have got me anyway."

Mr. MALTBY.—That's what I said.

Judge WICKERSHAM.—No, you said, "You have me." There's a distinction there.

Q. What was the result of your find there?

A. Four sacks of beer.

Q. Four sacks of beer. A. Yes.

Q. Now, Mr. McDonald, while you were uncovering this beer under the wood-pile, did you notice anything else around that particular part where you were making your search of the premises? [70—59] A. Yes, sir.

Q. What was it?

A. We noticed wood; we noticed beer, after we found it, and there was a trap-door in the floor that had just been built and some paraphernalia for hoisting something from under the building.

Q. Underneath the building? A. Yes, sir.

(Testimony of T. W. McDonald.)

Q. While you were procuring that beer and making your search there with Mr. McIntosh, did you notice the defendant Jerry Simpson come back to that part of the building?

A. Yes, sir; he came back several times; on one occasion he got caught on something. He was leaving the place and fell over a stick of wood. It sounded like a pail or something he had, and he dropped it.

Q. He dropped it?

A. I didn't notice, but I heard him swear a little when he fell.

Q. Did the defendant Jerry Simpson say anything in regard to the wood that you were uncovering?

A. I said, "What do you do with all the wood?" and he said, "We burn it."

Mr. MALTBY.—That's all.

Cross-examination.

(By Judge WICKERSHAM.)

Q. What kind of wood was it that he said they burned? A. Slab wood.

Q. How long?

A. Various lengths—from one foot to maybe 18 inches, as near as I can remember.

Q. Just ordinary length firewood was it?

A. Yes, sir. [71—60]

Q. And so Jerry fell at some time when he was there? A. Yes, sir.

Q. Now, you went down there with the officers under this first search-warrant? A. Yes, sir.

(Testimony of T. W. McDonald.)

Q. How long did you stay there, Mr. McDonald, under that first search-warrant?

A. Oh, I imagine we were there about, oh, about three-quarters of an hour or an hour.

Q. About three-quarters of an hour or an hour. You don't think it was longer than an hour?

A. No, I am not sure it wasn't longer than an hour.

Q. Was it that long?

A. About three-quarters of an hour.

Q. About three-quarters of an hour. Then you went away? A. Yes, sir.

Q. How long were you gone?

A. We was gone pretty near an hour or two.

Q. Where were you during that time?

A. McIntosh and I took a walk around town and then later we was at the Revilla for some time. We met Rutherford there and Handy.

Q. They came to you finally? A. Yes.

Q. Do you know where they had been during that time? A. No, I don't.

Q. When you went back the second time, how long did you remain there?

A. Well, we were there for quite a long while. We had quite a lot of work to do. I imagine it was, during the time we were searching there, we were there until pretty close to eleven o'clock.

[72—61]

Q. At night? A. Yes.

Q. How long was it after you went back this

(Testimony of T. W. McDonald.)

second time before the search-warrant came under which you resumed the search of the premises?

A. Rutherford and I were in the Dory, oh, about, we were there in about an hour, I would say, and Handy and McIntosh came with a search-warrant.

Q. Now, you went down there about two o'clock?

A. No; it was later than that.

Q. Oh; it was later than that. What time did you get down there?

A. The first time we went down there, it must have been about four.

Q. About four o'clock? A. Yes.

Q. It wasn't two o'clock? A. No, sir.

Q. And you remained there about three-quarters of an hour this first time? A. Yes, sir.

Q. And then you went away and you think you remained away an hour?

A. Pretty close to an hour.

Q. You and the other policeman? A. Yes, sir.

Q. And do you know where these other men were? A. No—

Q. (Interrupting.) Of your own knowledge, now, I'm talking about. A. Sure.

Q. Then you went back after about an hour?

A. Yes, sir. [73—62]

Q. And that brought you back there about what time?

A. I don't know just about what time of the day it was. I know it was pretty close to four o'clock when we went in on the first search-warrant because—

(Testimony of T. W. McDonald.)

Q. (Interrupting.) Well, then, if you were three-quarters of an hour, that would make it fifteen minutes to five. Then you were away an hour. That would bring you to fifteen minutes to six?

A. Yes, sir.

Q. And then you remained there until eleven o'clock?

A. Yes; we had a lot of work to do there; a lot of wood—

Q. (Interrupting.) Lots of wood to move?

A. Yes.

Q. Now, you said you were moving wood there and Jerry was present? A. Yes, sir.

Q. What did he say to you, just exactly, as near as you can remember? You testified, but I would like to have you repeat it.

A. He showed us the combination, for one thing.

Q. I didn't ask you that. I asked you what he said.

A. Well, he said, "You've got me anyway." We was working up on top, throwing away a lot of wood, and he wanted to show us an easier way to get at it.

Q. What did he show you?

A. He showed us the combination in the side. The wood was piled up and there were several slabs nailed together and we both pulled it out together. You could notice—

Q. (Interrupting.) He was just showing you how to pull it away. You were awkward about it, and he was just showing you an easier way, is that it?

(Testimony of T. W. McDonald.)

A. No; it was all nailed together. [74—63]

Q. Have you been in the habit of moving wood?

A. I have moved quite a lot of it.

Q. You don't think that you were awkward about it and Jerry was trying to show you how to move it?

A. His system was way quicker than ours.

Q. He was standing there, looking at this bunch of wood, wasn't he? A. He was watching it.

Q. And you saw that it was nailed together?

A. No, sir; we didn't see it. That was all—

Q. (Interrupting.) You didn't see it?

A. No, sir; that was all finish nails. You couldn't see them.

Q. Did you pull it out? A. He helped me.

Q. He helped you? A. Yes, sir.

Q. He took hold of it and what did he say?

A. He showed me an easier way.

Q. But what did he say?

A. He said, "I'll show you an easier way to get at it."

Q. "Show you an easier way to get at it," and then he took hold of this bunch of wood and pulled it out?

A. Yes, we both took a hold of it and pulled it out.

Q. What else did he say?

A. I asked him later on what he done with all the wood and he said "We burn it."

Q. "We burn it." Now, you spoke something about watching for something underneath the building until the tide went out.

(Testimony of T. W. McDonald.)

A. Under the first search-warrant, yes.

Q. Under the first search-warrant? A. Yes.

Q. What were you looking for there when the tide went out? [75—64]

A. I couldn't say whether it was under the first search-warrant or not. It was after we searched and I was back there and Mr. Handy told us to wait there until the tide went out, or wait around there.

Q. And you were waiting in the Dory?

A. Yes, sir; inside of the Dory.

Q. Did you wait until the tide went out?

A. And there were two or three others around there, too.

Q. Did you wait until the tide went out?

A. We was waiting until the tide went out.

Q. What did you find?

A. We didn't quite wait long enough. Handy came back there with the second search-warrant.

Q. Then you didn't find anything when the tide went out?

A. Well, we started to search the place.

Q. Well, now, I asked you if you found anything when the tide went out?

A. We didn't look; we didn't wait that long.

Q. You were upstairs in the Dory, watching, waiting until the tide went out?

A. Upstairs? No, sir.

Q. Well, you were in the main building. You were not down on the beach? A. No.

Q. You were in the Dory proper?

(Testimony of T. W. McDonald.)

A. The Dory proper; yes, sir.

The COURT.—Where were you in the Dory?

The WITNESS.—Right in the main—

The COURT.—(Interrupting.) The public place?

The WITNESS.—Yes, sir; two or three others in there, too.

Q. Were you in the back room? [76—65]

A. I don't know whether you would call it the back room or not. It's a card-room. There's some card-tables there. It's a part of the public—

Q. It is partitioned off from the main room of the Dory, isn't?

A. There is a kind of a partition, yes; on one side. There's no doors.

Q. Did you remain in the same place all the time? A. Yes.

Q. You remained in this back room?

A. In the card-room; yes.

Q. What was in that room?

A. Well, card-tables.

Q. What else?

A. I think there was a billiard-table, too. I am not positive about that.

Q. A billiard-table. And then when the new or second warrant came back, you went into this wood and storeroom? A. Yes, sir.

Q. There's where you found the beer?

A. Yes, sir.

Q. Did you find all the beer in that wood and storeroom?

A. Well, all I helped find was in that storeroom.

(Testimony of T. W. McDonald.)

Q. Didn't you see the beer found in the other rooms? A. I seen it after it was found.

Q. But you weren't present when it was found?

A. No, sir.

Q. So that you didn't see the beer in those rooms at all? A. No, sir.

Q. Didn't you see the beer before they took it out of those rooms?

A. Yes, sir; I helped to move it. I think they moved it out where they could, in the back room, so that they could get [77—66] it on to the truck.

Q. As a matter of fact, you took all that beer out that back way? A. Yes, sir.

Q. All of it out through the Wiley cabin?

A. Didn't look much like a cabin to me.

Q. It didn't?

A. I couldn't say that it was Wiley's cabin or not.

Q. You couldn't say that it was Wiley's cabin. Well, you know where that cabin is, don't you?

A. I know that there is a room in the back there; yes, sir.

Q. I show you now Defendant's Exhibit No. 2 and ask you to look at this part of the building shown back, immediately in front of the telephone post, with the letter A marked on the door. Is that the door through which you took all the beer?

A. Yes, sir; that's the door.

Q. That is the door? A. Yes.

Q. Why did you take it out that way?

A. Easier, easiest way to take it out.

(Testimony of T. W. McDonald.)

Q. It would be the easiest way to get in too?

A. I think they have an easier way.

Q. But that is the way you took it out?

A. That is the way we took it out.

Q. Now, you know whose cabin that is, with the letter A marked—

Mr. MALTBY.—(Interrupting.) We object to that as irrelevant and immaterial.

Q. Did you see the beer that was found in the cabin.

A. Yes, I seen some of the sacks. [78—67]

Q. In the cabin?

A. Not right in the cabin. I don't know whether it was right in the cabin or not. I think it was moved out by Handy and McIntosh.

Q. Moved out where? You mean out into the room?

A. Out into the hallway there, close to the water closet.

Q. You said into the room?

The COURT.—He said into the hallway.

Q. What hallway do you refer to?

A. I think it's a hallway. It's right close. There's a toilet there (indicating).

Q. Well, let's see. This is Mill Street here (indicating) and here is Front Street, and this is the Harry Wiley cabin, with two rooms in it.

A. Is this (indicating) Mill Street?

Q. Yes. This is the back alley (indicating).

A. Well, I think the beer was in here, when I seen it (indicating).

(Testimony of T. W. McDonald.)

Q. I wish you would take this pencil and mark that E, about where you saw it on that chart.

A. It's over here.

Q. Mark it with a small E. Make a small E there with the lead pencil; in that corner room, that is where you saw it?

A. I think that's about it. I wouldn't be sure, though. It looks like it.

Q. Did you find any beer in this room marked C?

A. No, I found beer up in here.

Q. All that you found was in this back room marked wood and storeroom? A. Yes, sir.

Q. Did you find any beer in Jake Saunders' cabin? A. No, sir. [79—68]

Q. You didn't find any in there?

A. I didn't pay very much attention to this, in fact, because Handy and the Chief of Police found that. I didn't pay much attention to it at all. I just noticed it—gave it a passing glance.

Q. But you saw the beer there? A. Yes, sir.

Q. Now, when you were in this wood and storeroom with Jerry and this beer was found and Jerry assisted you in pulling this wood down, didn't he say to you that there was no beer there and laughed at you and offered to bet you there wasn't any beer there, and you were discussing the matter in a friendly way? Do you remember that?

A. No, I can't say that I recall anything like that.

Q. Jerry said what he did out of nothing except out of pure conversation? A. Yes, sir.

(Testimony of T. W. McDonald.)

Q. Well, are you sure that Jerry didn't say there was no beer there and laughed at you?

A. I don't see how he could say—

Q. (Interrupting). Well, I'm not asking you how he could say it; I'm asking you whether or not he did say it. A. He had the beer.

Q. You didn't have the beer when you were having this conversation?

A. I can't recall that he said anything like that.

Q. You can't recall that? A. No.

Q. All right. That's all.

Mr. MALTBY.—That's all.

(Witness excused.) [80—69]

Testimony of Lonnie McIntosh, for Plaintiff.

LONNIE McINTOSH, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. MALTBY.)

Q. Your name is Lonnie McIntosh?

A. Yes, sir.

Q. Were you living in Ketchikan on the seventh of January last? A. Yes, sir.

Q. What official position did you hold at that time? A. Chief of Police, Ketchikan.

Q. Do you know the defendant, Jerry Simpson?

A. I do.

Q. Do you know where the premises are, known as the Dory? A. I do.

Q. Will you please say where they are located?

(Testimony of Lonnie McIntosh.)

A. Down the south end of Main Street, on the corner.

Q. In the town of Ketchikan? A. Ketchikan.

Q. Do you know Mr. Handy, the deputy United States marshal? A. I do.

Q. And Mr. McDonald? A. I do.

Q. I will ask you if you know what Mr. McDonald was doing on the seventh day of January last?

A. Night patrolman for the city of Ketchikan.

Q. I will ask you if you had occasion to go to the premises that you have mentioned, the Dory, on the seventh day of January, 1922? A. Yes, sir.

Q. And under what authority, if any, did you go there?

A. Under the authority of a search-warrant.
[81—70]

Q. With whom did you go?

A. Deputy Marshal Handy.

Q. About what time was it that you went?

A. Why, it was in the afternoon, around three or four o'clock.

Q. And did you proceed to make a search of the premises under that search-warrant?

A. Yes, sir; we did.

Q. Did you cease your search under that search-warrant—

Judge WICKERSHAM.—I object, if the Court please. Counsel is leading the witness entirely.

The COURT.—Well—

Judge WICKERSHAM.—I know it's easier.

(Testimony of Lonnie McIntosh.)

The COURT.—You may ask if he did. This is the original search-warrant?

Mr. MALTBY.—The first search-warrant.

The COURT.—He may answer.

A. We abandoned the first search-warrant; yes.

Q. Did you leave the premises after you abandoned the first search-warrant?

A. Yes, we did.

Q. Do you know if any of the officers who were assisting under the first search-warrant remained in the building?

A. Not at that time; no, sir.

Q. How long, if you can state, after you left the building, under the first search-warrant, did you return?

A. We returned around an hour, I believe it was.

Q. About an hour afterward? A. Yes.

Q. What was your purpose in returning?

A. We returned to wait for the tide to go out to get some booze that dropped— [82—71]

Judge WICKERSHAM.—(Interrupting.) Now, I object to that. It's simply his conclusion, and I object to it. The witness ought not to be allowed to state anything of that kind.

Mr. ZIEGLER.—There is no evidence of that kind.

The COURT.—Yes.

Judge WICKERSHAM.—I move to strike his answer out.

The COURT.—Well, a part of it. Strike out the last part of it.

(Testimony of Lonnie McIntosh.)

Q. Just state, Mr. McIntosh, what your purpose was in going back?

A. We went back there to wait for the tide to see what it was that dropped down from the trap-door.

Q. Where was this trap-door?

A. In the rear end of the Dory; in the back of the Dory.

Q. How long did you stay there? Who was with you at that time?

A. Fred Handy, Deputy Marshal, Patrolman McDonald, Dave Rutherford, the game warden, and myself.

Q. How long did you stay there at that time?

A. We stayed there for a few minutes and then Mr. Handy and myself went outside and we looked around outside for a while.

Q. Now, did you again—did you have occasion to go to the Dory again after that?

A. Yes, sir; we did.

Q. Under what authority?

A. Under the authority of a search-warrant.

Q. With whom did you go?

A. Deputy Marshal Handy.

Q. Did you assist in making the search under that search-warrant? [83—72]

Judge WICKERSHAM.—Now, may it please the Court, I want to object to this search-warrant. This witness testified that they went back under the search-warrant to search these premises, etc. Now, the best evidence of that is the search-war-

(Testimony of Lonnie McIntosh.)

rant. The search-warrant will describe the property. This witness can't testify what is in that search-warrant in that way. It seems to me that we're entitled to have those search-warrants put in here.

The COURT.—You can put them in when you get to your defense. Objection overruled.

Judge WICKERSHAM.—We object. Exception.

The COURT.—You may state what you did.

Q. What did you do then, Mr. McIntosh, when you went there with the deputy marshal under the second search-warrant?

A. We searched the premises.

Q. What premises? A. Of the Dory.

Q. Will you please state what the result of your search was?

A. We found something like fifty or sixty sacks of beer.

Q. Who assisted you, if anyone, in making the search?

A. Deputy Marshal Handy and Patrolman McDonald and Dave Rutherford and myself searched the place.

Q. Did you find any beer?

A. Yes, found some beer hid in the wood-pile,—McDonald and myself.

Q. Where was this wood-pile located?

A. It was located in the storeroom.

Q. In the storeroom of what? A. The Dory.

Q. Did you see the defendant, Jerry Simpson, around there at any time? A. I did. [84—73]

(Testimony of Lonnie McIntosh.)

Q. Where was he at the time that you were making your search under the wood-pile?

A. He was in there, looking at us.

Q. I will ask you if Mr. Simpson, the defendant, said anything to you while you were working there?

A. Yes; we were uncovering the wood-pile, and it was taking us quite a long time, and Jerry said, "I'll show you an easier way. You've got me, any way." So he pulled out some slabs that were nailed together, that made a kind of a little tunnel, and we found, I think, three or four sacks of beer in there.

Q. Did you see Mr. Simpson at any other time while you were making that search?

A. Well, he was in, off and on.

Q. Did you—do you know where the storeroom is located on those premises? A. I do.

Q. I will ask you if you assisted in the search of that storeroom? A. I did.

Q. I will ask you how you gained admission to the storeroom? A. Jerry Simpson let us in.

Q. Who let you in? A. Jerry Simpson.

Q. How did he let you in?

A. Got a key from Jake Saunders.

Q. How do you know that he got a key from Jake Saunders?

A. I accompanied him until he got the key.

Q. Who is Jake Saunders?

A. Jake Saunders is the man that works in there.

(Testimony of Lonnie McIntosh.)

Q. What was he doing, if you know, for Jerry Simpson? [85—74]

A. He was tending bar.

Q. What did he do with the key after he received it from Jake Saunders?

A. Came back to the storeroom and opened up the storeroom and let us in.

Q. What did you get there, if anything?

A. In the storeroom we found something like twenty sacks of beer.

Q. Did you, while you were searching for the beer under this wood-pile, did you notice anything else around there?

A. I noticed a trap-door, with some tackle to hoist something up from below.

Q. Did you open the trap-door? A. I did.

Q. Where did the trap-door lead to?

A. Down to the bay.

Q. Did you see Mr. Simpson, the defendant, while you were uncovering this wood-pile and making your search, procure anything from that part of the building that you were in?

A. No, I didn't see him take anything out.

Q. You didn't see him? A. No.

Mr. MALTBY.—That's all.

Cross-examination.

(By Judge WICKERSHAM.)

Q. What official position did you hold then, Mr. McIntosh? A. Chief of Police of Ketchikan.

Q. What time did you first go down there, that is under the first warrant?

(Testimony of Lonnie McIntosh.)

A. I believe it was around three or four o'clock. I couldn't say exactly the time. [86—75]

Q. Well, you think it was three o'clock or four o'clock?

A. I wouldn't say. It was either three or four—around that.

Q. Were you present when Mr. Handy testified that it was two o'clock in the former trial of this case, in the lower court?

A. I was. I wasn't in there at the time he testified. I believe he was testifying while I was outside.

Q. But you were here when he testified to-day that it was two o'clock? A. Yes, I was.

Q. Now, you think it was three or four o'clock? A. Yes.

Q. Were you with Mr. Handy all the time?

A. Not all the time.

Q. Whom did you go with mostly that evening, with Patrolman McDonald?

A. I was around with Mr. McDonald a while.

Q. More than you were with Mr. Handy?

A. Oh, about the same.

Q. About the same. So you think you went down there three or four o'clock. A. Yes.

Q. How long did you stay there?

A. Under the first search-warrant, we stayed there around one hour, I believe.

Q. About one hour. A. Yes.

Q. And then you think you went away?

A. I know we went away.

(Testimony of Lonnie McIntosh.)

Q. You know that? A. Yes, sir. [87—76]

Q. Who went with you?

A. Deputy Marshal Handy and Patrolman McDonald and myself.

Q. Where did you go?

A. Mr. McDonald and I, I believe, walked around town for a while, talking it over.

Q. When did you go back?

A. Well, we met Mr. Handy and Mr. Rutherford—

Q. Now, I asked you when you went back.

A. Well, it was about one hour later.

Q. One hour later. A. Yes.

Q. Who was there when you went back?

A. Who accompanied—

Q. Yes, who accompanied you?

A. Deputy Marshal Handy, Dave Rutherford and McDonald and myself.

Q. How long did you remain there that time?

A. Well, I remained there for about five or ten minutes, I believe.

Q. Where did you go then?

A. Mr. Handy and myself went out and looked around the place for a while.

Q. And then went back? A. Yes.

Q. Now, you say, Mr. McIntosh, that this wood was in the Dory? A. Yes, sir.

Q. Now, you want this jury to understand that you swear that that wood in the storeroom was in the Dory? A. That is what I call it.

Q. That is what you call it?

(Testimony of Lonnie McIntosh.)

A. Yes. [88—77]

Q. You think that is a fair statement to make to this jury, do you?

A. Well, that's all I know about it. It might be different, but that's all—

Q. (Interrupting.) You have been testifying all the time that that wood and that storeroom was in the Dory, haven't you? A. I believe I have.

Q. And you don't want to change it now?

A. No.

Q. Don't you know that it was under the roof of the Northern Building?

A. It was underneath the Northern, yes; but the Dory—

Q. (Interrupting.) But—

Mr. MALTBY.—(Interrupting.) Let him answer the question.

A. (Continuing.) But the Dory adjoins it. It's all the same.

Q. Yes, and the Revilla Hotel is a little farther up the street. A. I believe it is, yes.

Q. But you want to tell this jury now that all that wood was under the roof of the Northern Building, don't you?

A. It was underneath the roof of the Northern, yes.

Q. And the Northern and the Dory are separated from each other by a space of three feet, aren't they, except in places?

A. In some places they are separated, yes.

Q. And they are different buildings, aren't they?

(Testimony of Lonnie McIntosh.)

A. Well, I never noticed.

Q. You know the buildings, don't you?

A. Yes.

Q. Is the Northern Building the same as the Dory Building? A. I couldn't say.

Q. You couldn't say? A. No. [89—78]

Q. Don't you know that the Northern Building is two stories high? A. I think it is.

Q. And don't you know that the Dory is only one story high? A. Yes.

Q. And don't you know that this room where they had the wood is under the roof of the Northern?

A. It's underneath the roof of the Northern.

Q. Well, then, when you said it was under the roof of the Dory, you didn't mean that?

A. I didn't say that it was under the roof of the Dory.

Q. You didn't?

A. No; I said it was in the Dory, but not under the roof of the Dory.

Q. You still say it is in the Dory?

A. That's what I said.

Q. And you are going to stick to it. Is that right?

A. That was my opinion; yes; that's my opinion.

Q. But what is the fact?

A. It is underneath the roof of the Northern, but I always figured that it was the same place.

Q. Yes. I show you Plaintiff's Exhibit No. 2 and ask you to state to the jury what the large building

(Testimony of Lonnie McIntosh.)

is that is showing the flat side to you, if you know.

A. Yes; this is the Northern.

Q. The two-story building? A. Yes.

Q. Where is the Dory Building from that?

A. Can't see it from here.

Q. Can't see it. Now, I show you another photograph, which I intend, may it please the Court, to ask to have marked for [90—79] identification. Now, I show you this photograph, showing the front of those two buildings. What buildings are those?

A. Well, there is the Dory and the Northern there (pointing).

Q. Now, which building was the wood in?

A. It was underneath the Northern.

Q. Yes. I offer this photograph, may it please the Court, in evidence or for identification.

The COURT.—Give it the next number. I think it is—.

(Whereupon photograph offered was received in evidence and marked Defendant's Exhibit No. 3.)

Q. Now, you went with Jerry to get the key from Jake Saunders? A. I did.

Q. Where did you find Jake?

A. Jake, oh, I believe he was around the stove, somewheres near the bar.

Q. What building was he in?

A. He was in the Dory.

Q. He was in the Dory and Jake had the key?

A. Jake had the key; yes.

Q. Do you know whether Jake has a room at the

(Testimony of Lonnie McIntosh.)

rear end of the Northern or not? A. Yes, he has.

Q. Were you in that room that night?

A. I was in the room that afternoon.

Q. That afternoon. Did you find any beer there?

A. No, sir.

Mr. MALTBY.—I object to that, if the Court please.

Q. State what Jake said when he was asked for the key? A. I never heard him say anything.

Q. Just tell us what happened when you went out with Jerry to get that key to the storeroom?

A. Jake found the key and Jake gave it to him.

[91—80]

Q. Yes. A. And then we went back again.

Q. Jerry unlocked the door?

A. Jerry unlocked the door.

Q. Now you and Mr. McDonald made a search in this wood for beer? A. We did.

Q. While you were doing that, Jerry called your attention to the fact that you weren't doing it as he thought it should be done, or something of that kind was said, wasn't there?

A. Jerry said, "You've got me anyway, so I'll show you an easier way," and he pulled out some slabs.

Q. Those slabs were right in front of your nose?

A. Yes.

Q. And you were at work on it yourself?

A. Well, farther back. We are getting down that way.

Q. Was there a table there under the wood?

(Testimony of Lonnie McIntosh.)

A. There was, yes.

Q. Whereabouts was this wood that he pulled out with reference to that?

A. Right underneath the table.

Q. Right underneath the table. And there were some sacks in there? A. Three or four.

Q. Did you have any conversation with Jerry about what was in there before you looked in?

A. No, I don't believe I had any conversation.

Q. Didn't Jerry laugh at you and offer to bet you that there wasn't anything in there?

A. Yes, I think Jerry did make some kind of remark like that.

Q. To whom did he make that remark?

A. To the bunch in general, I suppose—all of us.
[92—81]

Q. Offered to bet you that there wasn't anything there?

A. Yes, I believe he did—something like that.

Q. And when you got into that, I believe you found one sack? A. No; about three sacks.

Q. Now, think that over carefully?

A. Three sacks of beer.

Q. You are sure of that?

A. I'm positive that there was three.

Q. Wasn't there only one sack with a few bottles in it? A. No; I'm pretty sure there was three.

Q. You are sure about that? A. Yes, sir.

Q. What else was in there?

A. There was some straw in there that covered whiskey bottles.

(Testimony of Lonnie McIntosh.)

Q. What else? A. That's all I remember.

Q. Were there any bottles of beer in bottles standing up on the north wall of that room?

A. There was some near beer; yes.

Q. Some near beer? A. Yes.

Q. You saw that? A. I seen that; yes.

Q. What else was in that room?

A. There was a trap door there?

Q Yes. You told the jury that two or three times now.

The COURT—Well, you asked him.

Judge WICKERSHAM.—That it was in the room?

The COURT.—Oh, yes.

Judge WICKERSHAM.—Well, the witness knows what I am trying to get at. I want him to testify what else was in the room in the way of personal property. [93—82]

The COURT.—Besides what he has testified to?

Judge WICKERSHAM.—Yes; besides what he has testified to.

WITNESS.—Well, there was a couple of trunks, and I think I seen some part of a billiard-table, and some other stuff.

Q. The room was full of plunder of all kinds?

A. There was a lot of different things in there.

Q. It was an old storeroom? A. Yes.

Q. Weren't there three billiard-tables knocked down? A. I didn't notice..

Q. There was no billiard-table set up? A. No.

Q. It didn't look as though the room was occu-

(Testimony of Lonnie McIntosh.)

pied for any purpose except storage and whatever was in there?

A. It looked like that is what it was for; yes.

Q. There was a lot of wood in there and coal and all this paraphernalia that you have talked about?

A. Yes; different paraphernalia.

Q. Now, did you see any beer in any other room except that one? A. Yes, I did.

Q. Where else did you see the beer?

A. Well, I didn't find the beer in the other room. I just remember that what was found was right back of the door leading out to another room from this storeroom.

Q. I show you a plat. This plat represents— This is Front Street and this represents Mill Street. This (indicating) represents the Dory here.

A. Yes.

Q. Will you examine that and point out where this wood and storeroom was, this being the alley back here (indicating). The other witness turned that around so as to get it in the [94—83] right direction. Now this (indicating) is Mill Street and here is Front Street and here is the alley back here.

A. This (indicating) is the entrance to the Dory.

Q. That is the entrance to the Dory.

A. Here (indicating) is the storeroom there.

Q. Mark that storeroom with an E, won't you, or an F? Mark it with an F.

(Witness does so.)

Q. Is that the place you found part of the beer?

(Testimony of Lonnie McIntosh.)

A. Yes.

Q. That one room? A. Yes.

Q. Now, were there— Where else did you find beer?

A. I didn't find it. I don't know where they found it.

Q. Where did you see it?

A. I seen it in one of these places here (indicating).

Q. Mark that G.

(Witness does so.)

Q. How much of the beer, or how many sacks of beer did you find back in this place that you have marked G?

A. Oh, I suppose twenty-five or thirty sacks.

Q. Twenty-five or thirty sacks? A. Yes.

Q. How many did you find in this larger storeroom? A. We found about twenty sacks.

The COURT.—Speak louder.

The WITNESS.—We found about twenty sacks.

Q. You found about twenty sacks in that large storeroom? A. Yes.

Q. And twenty-five or thirty back in this cabin?

A. Yes. [95—84]

Q. You know, don't you, that this cabin at the rear of the Northern Building, where you found this twenty-five or thirty sacks, is separated from the Northern Building?

A. Yes, sir; it is separated by a little space. Doors join it.

Q. You carried this beer out through that cabin

(Testimony of Lonnie McIntosh.)

with the other beer on to the street? A. Yes, sir.

Q. Who did you go down there with, in the first place, under the first warrant?

A. Marshal Handy and McDonald.

Q. Deputy Marshal Handy? A. Yes, sir.

Q. And went with him the second time?

A. Yes, sir.

Q. He asked you to go? A. Yes.

Q. He did? A. Yes.

Q. Do you know whether Mr. McDonald and you both went at his request?

A. We both went at his request.

Q. And you acted under his instructions all the time? A. Yes, sir.

Q. Now, at the time you say that Jerry said, "Well, you got me anyway," and showed you this wood, how to handle the wood, had you found anything up to that time?

Mr. MALTBY.—You mean, if Mr. McIntosh found any?

Judge WICKERSHAM.—I mean any of them.

Mr. MALTBY.—If you know.

A. I can't say as to that. I wouldn't say one way or the other.

Q. Now, isn't it a fact that you had not found anything? [96—85]

A. Well, I wouldn't swear either way. I don't remember.

Q. Now, you mentioned also that there was a trap-door at the rear end of the Dory. Where is that trap-door?

(Testimony of Lonnie McIntosh.)

A. Well, there is a partition and it is right in back of this partition and another little room.

Q. Point it out on this map?

A. There it is (pointing) right in there.

Q. It isn't marked. Make a letter H about where you think it is. A. Where the trap-door is?

Q. Yes.

A. Well, the trap-door I figure was right in the corner around here (showing).

Q. About there, you think? A. Yes.

Judge WICKERSHAM.—That's all.

Redirect Examination.

(By Mr. MALTBY.)

Q. Mr. McDonald, or Mr. McIntosh, how do you get to what is known as the Dory, or from what is known as the Dory back into where this beer was found under the wood-pile?

A. Well, there is a door leading right back there.

Q. Please explain to the Court and jury how, after you enter the front door of the Dory—just please give them an idea of the geography of the place there, will you?

A. Well, after you enter the front end of the Dory, you walk back and it's on the right-hand side, a little past the lunch counter. There is a door there and leads you right into it.

Q. And it is back in through there where you found this beer? A. Yes, sir.

Q. Now, after you started to search under the second search-warrant, did you see Jerry Simpson and Jake Saunders coming [97—86] from the

(Testimony of Lonnie McIntosh.)

direction where you uncovered the beer, under that wood-pile.

Judge WICKERSHAM.—Now, I object to that as leading and suggestive.

Mr. ZIEGLER.—And not redirect examination, either.

The COURT.—Objection overruled, as being leading and suggestive, because he can ask him—simply a preliminary question, I suppose.

Mr. MALTBY.—Well, I should have directed his attention to the fact that it was before the second search-warrant was issued and while he was in the Dory, if he saw the defendant Jerry Simpson and Jake Saunders in or around the place there.

A. I was standing outside of the Dory.

Judge WICKERSHAM.—I object. He can answer that yes or no.

Q. And did you see him, or them? A. No.

Q. Did you see them at all?

A. I seen them in the Dory. I don't quite understand what you mean.

Q. Well, before the second search-warrant was issued and before you started your search under the second search-warrant, did you at any time see Jake Saunders and Jerry Simpson inside of the premises? A. I seen them in the Dory; yes.

Q. Where were you when you saw them?

A. I was in the Dory.

Q. You were in the Dory. What were they doing, if anything?

A. Nothing that I know of—just around there.

(Testimony of Lonnie McIntosh.)

Q. What part of the Dory were they in?

A. In the front part.

Q. Now, while you were— Before the second search-warrant was [98—87] issued and while you were in the vicinity of the Dory there, did you see Jake Saunders and Jerry Simpson coming from anywhere—

Judge WICKERSHAM.—Now, I object to that as leading and suggestive.

Mr. MALTBY.—That is not leading or suggestive.

Judge WICKERSHAM.—“Coming from”?

The COURT.—“Anywhere”? He may answer.

Judge WICKERSHAM.—Object. Exception.

A. Yes.

Q. From where?

A. Coming from the storeroom.

Q. Coming to where?

A. Just outside in the little alleyway. They stopped there. I got out of there before they seen me.

Mr. MALTBY.—That’s all.

Recross-examination.

(By Judge WICKERSHAM.)

Q. What were you doing in the alleyway?

A. I wasn’t in the alleyway.

Q. Where were they?

A. I said they were—they come out of the store-room into that little alleyway.

Q. Could you see from the Dory?

(Testimony of Lonnie McIntosh.)

A. I could look right through from the Japanese noodle joint.

Q. You were in there?

A. No; I wasn't in there. I was outside.

Q. You were outside on the street?

A. Outside on the street, looking in.

Q. You were looking in and you could see them come out there into the alleyway? [99—88]

A. Yes.

Q. And you still watched the premises around there? A. Yes; Mr. Handy and I both.

Q. Under his instructions. That was before the second warrant came? A. Yes.

Q. And at that time you had other men stationed inside, didn't you? A. I didn't; no.

Q. Mr. Handy did, didn't he?

Mr. MALTBY.—If he knows.

Q. If you know.

A. McDonald and Rutherford, they were in there.

Q. McDonald and Rutherford were in there, acting under the deputy marshal's instructions?

A. I know they were in there.

Q. That's after they abandoned the first warrant and after the second warrant came back?

A. Yes; they were in there.

Judge WICKERSHAM.—That's all.

(Witness excused.)

Testimony of Harold A. Snyder, for Plaintiff.

HAROLD A. SNYDER, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. Just state your name?

A. Harold A. Snyder.

Q. Where do you live? A. Ketchikan.

Q. Have you made any study of chemical analyses, Mr. Snyder? A. I have. [100—89]

Q. Have you had any experience outside of your studies in chemical analyses? A. I have.

Q. From such study and experience, can you determine, by analysis, the alcoholic content, or the want of alcoholic content, of any liquor?

A. Yes, sir.

Q. In beer and other fermented liquors, as well as spirituous liquors? A. Yes, sir.

Q. Let me ask you if you recognize this bottle and the contents (exhibiting bottle).

Judge WICKERSHAM.—I want to make the objection, may it please the Court, to those questions.

A. (Examining bottle.) Yes, sir; I recognize it.

Q. What is it? Where did you get it?

A. I got it from Mr. Handy.

Q. What is in it? A. Beer.

Q. Did you make any chemical analysis of the contents or any part of the contents of this beer?

(Testimony of Harold A. Snyder.)

A. I did.

Q. When?

Judge WICKERSHAM.—I object, may it please the Court. It is immaterial, irrelevant and incompetent. It isn't shown to have been found on the place under either of these search-warrants.

The COURT.—He may answer.

Judge WICKERSHAM.—Exception.

Q. When? A. The twenty-first.

Q. You say you did make a correct analysis of the contents or part of the contents of this bottle?
[101—90]

A. Yes, sir.

Q. State the result of your examination as to the alcoholic content, if any.

Judge WICKERSHAM.—I renew my objection generally.

The COURT.—The same ruling.

Judge WICKERSHAM.—Exception.

The COURT.—The same exception allowed.

Q. All right, now, please state the result of your examination as to the alcoholic content, if any?

A. I found it to be 5.2 per cent alcoholic contents by volume.

Q. 5.2 alcohol by volume? A. Yes, sir.

Q. I will offer this, if the Court please, in evidence.

Judge WICKERSHAM.—We object to it for the reasons heretofore stated.

The COURT.—It may be received in evidence.

(Testimony of Harold A. Snyder.)

(Whereupon bottles of beer were received in evidence and marked plaintiff's exhibits.)

Judge WICKERSHAM.—Note an exception.

Q. I will ask you if you recognize this bottle (handing bottle to witness).

A. Yes, sir.

Q. What is in that bottle? A. Beer.

Judge WICKERSHAM.—We make the same general objection.

The COURT.—Oh, yes; you may take your objection to all this class of testimony. The same ruling.

Q. Where did you get the bottle and contents?

A. From Mr. Fred E. Handy.

Q. Have you made any chemical analysis of the contents or any part of the contents of this bottle?

A. Yes, sir. [102—91]

Q. You stated, I believe, that it was beer?

A. Yes.

Q. What would you say the alcoholic content was, if any? A. 5.25 per cent.

Q. What? A. Alcoholic content by volume.

Mr. STABLER.—If the Court please, I will offer this as exhibit No. 2.

The COURT.—It may be received, subject to the objection.

Judge WICKERSHAM.—We renew our objection.

The COURT.—The same ruling. Exception allowed.

(Testimony of Harold A. Snyder.)

Q. From your experience, could you state that that was intoxicating? A. Yes.

Mr. STABLER.—That's all.

(Whereupon said bottle of beer was received and marked Plaintiff's Exhibit No. 2.)

Plaintiff rests. [103—92]

Testimony of F. E. Handy, for Plaintiff (Recalled).

F. E. HANDY, having been recalled as a witness on behalf of the plaintiff, and having previously been sworn, was examined and testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. Your name is Handy, Fred Handy?

A. Yes, sir.

Q. Deputy United States marshal?

A. Yes, sir.

Q. Now, Mr. Handy, on January seventh, when you made this raid at Jerry's place, called the Dory, I want to ask you how many different brands of beer you discovered on those premises?

A. Two.

Q. What were those brands?

A. Britannia and Export. [113—102]

Q. Now, how many sacks, approximately of the Britannia beer did you discover?

A. Three and a half sacks, besides those sixty bottles in evidence.

Q. And approximately how many sacks of the Export Lager?

(Testimony of F. E. Handy.)

A. There must have been over fifty—fifty-four, fifty-three or fifty-four, something like that. I think there's supposed to be fifty-seven original sacks.

Q. How many sacks did you take from this one room; that is the storeroom connected with the Dory?

A. About thirty, or over thirty sacks; about that.

Q. Now, did you take, or was that taken from the place known as the storeroom; that is, where the wood was stored? A. Yes, sir.

Q. Now, this beer here, Lager and Britannia, that is a sample of the Britannia beer that you took from the premises?

Judge WICKERSHAM.—I object to counsel's leading the witness.

The COURT.—Well, don't lead your witness.

Q. I will ask you if that is a sample of any kind of beer taken from those premises.

A. This (examining) is a sample of one kind—the Britannia beer.

Q. What is this bottle here (handing bottle to witness).

A. That is a sample of the other kind—the two kinds.

Q. Did you find any other kind of beer on these premises? A. No, sir.

Q. Any place? A. No, sir.

Q. Do you know where that beer is made?

A. One brand, I think, is made in Victoria and the other in New Westminster. I wouldn't be posi-

(Testimony of F. E. Handy.)

tive. I think that's the way the label reads.
[114—103]

Q. You know that from the labels on the bottles?

A. Yes, sir.

Judge WICKERSHAM.—Well, then I move to strike out his testimony, because it's hearsay and not from his own knowledge.

The COURT.—Yes, it may be stricken.

Judge WICKERSHAM.—I'll ask the Court to instruct the jury not to pay any attention to that testimony.

Mr. MALTBY.—That is, as to where the beer was made?

Judge WICKERSHAM.—Yes.

The COURT.—The jury will not pay any attention to Mr. Handy's testimony in reference to where the beer was made, because he states from the labels on the bottles themselves.

Mr. MALTBY.—That's all.

Cross-examination.

(By Judge WICKERSHAM.)

Q. Now, Mr. Handy, you think there were about thirty sacks found in that big storeroom?

A. There were about thirty.

Q. How many sacks did you find back in Wiley's room? A. Where?

Mr. STABLER.—Now, if the Court please, this witness has not testified that he found any in Wiley's room.

Judge WICKERSHAM.—I'm asking if he did find some back there.

(Testimony of F. E. Handy.)

The COURT.—Back where?

Judge WICKERSHAM.—Back there in Wiley's room.

The COURT.—There is no testimony as to any Wiley room.

Judge WICKERSHAM.—The Wiley cabin?

The COURT.—Nobody testified as to Wiley's cabin; no testimony by the prosecution as to any Wiley cabin. [115—104]

Judge WICKERSHAM.—If the Court will permit me to have the map—

The COURT.—Yes. (Hands map to Mr. Wickersham.)

Q. I call your attention to the cabin on the back part of the lot behind the Northern Hotel, where you marked C yesterday and to the back corner where you made a mark, and ask you how many sacks of beer you found in there, this (indicating) being Mill Street here, this Front Street and that the alley back there?

A. Twenty sacks in the corner of this room.

Q. Were they the same brands of beer that you found in this other room?

A. I couldn't say as to that. They were in sacks.

Q. They were all in sacks?

A. All the beer was in sacks, and I took it up to the courthouse.

Q. What did you do with it when you got to the courthouse?

A. I put it in the courthouse here and took them

(Testimony of F. E. Handy.)

out the next morning and counted them—put them all out on the floor.

Q. How many did you have?

A. Over twelve hundred, about 1,250, as near as I could tell with the broken ones.

Q. Now, where did these two bottles (indicating) come from?

A. They come out of that bunch of beer that was brought up.

Q. The 1,250 bottles? A. Yes, sir.

Q. You are sure about that?

A. Yes, I am sure about that.

Q. How sure are you about that, that they came out of the 1,250 bottles?

Mr. STABLER.—Now, if the Court please, I object to that. [116—105] He's arguing with the witness.

The COURT.—He states he is sure about it; that's enough.

Q. Were they in your possession? A. Yes.

Q. How frequently did you see them?

A. I had them under lock and key all the time.

Q. Well, then, did those two bottles come out of the back room or the woodroom?

A. They come out of the— I don't know which room those bottles come out of. They come out of the original 1,250 bottles.

Q. But you don't know whether they came out of the cabin at the back end of the Northern or the woodroom, do you? A. That I couldn't say.

(Testimony of F. E. Handy.)

Judge WICKERSHAM.—That's all.

Redirect Examination.

(By Mr. STABLER.)

Q. Let me ask you if you found either one or the other of those kinds of bottles, or of beer, rather, in this storeroom; that is, in the woodroom? Could there have been any other kind?

Judge WICKERSHAM.—Now, I object to counsel's testifying. Counsel shouldn't do that.

The COURT.—Yes.

Q. Can you say what kind of beer you found in the storeroom, that is the woodroom?

A. Export Lager.

Judge WICKERSHAM.—And you found the same kind in the other room?

A. I couldn't say as to that because— [117—106]

Judge WICKERSHAM.—Is there any other kind in the 1,200 or twelve hundred and fifty bottles except Britannia and Export? A. No, sir.

Judge WICKERSHAM.—That's all.

Mr. STABLER.—That's all.

Plaintiff rests. [118—107]

Whereupon argument was had by respective counsel, after which the following instructions were delivered to the jury:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

This action was initiated in the Commissioner's

Court of the Ketchikan Precinct, on January ninth last, with the filing, by Deputy Marshal Handy, of a criminal information against J. B. Simpson and Jerry Simpson, charging them with having, on January 7, 1922, in their possession, or under their control, intoxicating liquor at Ketchikan, in the Territory of Alaska. At the outset of the trial in the Commissioner's Court, separate trials were demanded by the defendants and each in that court were separately tried. Each separately appealed to this court from the judgment of conviction before the Commissioner, and this case before us now is on appeal of the defendant Jerry Simpson from judgment and sentence of the lower court, and the case is now about to be finally submitted to you on the question of the guilt or innocence of the defendant Jerry Simpson, solely upon the evidence produced before you and the law, as I am about to instruct you on.

I instruct you that the fact that the defendant was convicted in the lower court of the charge on which he is now being tried before you, should not be taken or considered by you in any manner or way as a presumption that he is guilty of the crime charged. When a person charged with a crime has regularly appealed from the Commissioner's Court to this court, under our law he is entitled to trial by this Court and a jury anew. That is to say, he comes before the court and jury with [165—154] exactly the same presumption of innocence that surrounds him when he comes before the court for trial on an accusation initiated in this court. You are,

therefore, not to suffer or permit the result of the trial in the lower court to influence you in arriving at your verdict. In this case, therefore, as in all other criminal cases, the defendant comes before you with the presumption that he is innocent of the crime of which he is accused and this presumption abides with him throughout the trial until the evidence produced before you shall have convinced you, beyond a reasonable doubt, that he is guilty of the offense charged.

The law, of the violation of which the defendant is accused, is what is commonly called the "Alaska Bone Dry Law" and makes it a misdemeanor for any person, house, association, firm, company, club or corporation, his, its or their agents, officers, clerks, servants, to have in his or its possession, any intoxicating liquor in the Territory of Alaska; and further provides that the term "intoxicating liquor" whenever used in the act, shall be deemed to include whiskey, brandy, rum, gin, wine, porter, beer, cordials, hard or fermented cider, alcoholic bitters and malt liquors, including alcoholic compounds classed by the Internal Revenue Service of the United States as compound liquors. It is further provided in the act, that it shall not be necessary, in a warrant, information, or indictment, to specify the particular kind of alcoholic liquor which is made the subject of the accusation, for a violation of the act. So that, as in the complaint in this case, it is charged that the defendant had in his possession alcoholic liquors, such charge covers all descriptions

of liquor above set forth as deemed included in the term "alcoholic liquors." [166—155]

The information in this case charges the defendant with having had in his possession intoxicating liquor, without designating the particular kind of liquor. Under the statute, however, beer is classed as intoxicating liquor, the possession of which is denounced by the statute, and to that class of liquor the whole evidence of the prosecution is directed.

If, therefore, you should find from the evidence, beyond a reasonable doubt, that the defendant, on the seventh day of January, 1922, at Ketchikan, in the Territory of Alaska, had beer in his possession or under his control, then it would be your duty to find him guilty as charged. If, however, you should, from the evidence or lack of evidence, have a reasonable doubt as to his having had in his possession or under his control, at the time and place stated, beer, then it would be your duty to acquit.

The statute condemns possession or control of the classes of liquor mentioned therein. Now, possession, as contemplated by the statute, does not mean actual, physical, manual possession or control, but it means dominion and control over the property denounced by the statute. A person may have possession and control over a chattel through others, as, for instance, his servants, agents or employees. So it is not necessary that it should be proved by the prosecution that the defendant had actual manual possession or control of the property denounced under the statute. However, the possession or control denounced by the statute must

be a conscious possession or control; that is to say, a control with knowledge; that is, knowledge in the defendant that he had control or possession of the property denounced by the statute. Therefore, the possession required by the statute to be a crime must be a conscious dominion and control over the property, either [167—156] personally or through the agency of others.

If, therefore, from the evidence or lack of evidence, you have a reasonable doubt as to whether the defendant knew that the beer alleged by the prosecution to have been found in the Dory, if you should find beer was found therein, was therein and under his dominion and control, then it would be your duty to acquit.

It appears from the testimony that a large number of bottles testified to by the Government's witnesses were found under a search-warrant issued for the search of the Dory soft drink establishment and the lower floor of the Northern Hotel. The Government contends that the place where the beer was found was a part of the Dory establishment and the defendant contends that it was not. This is an issue raised in this case as bearing on the question whether or not the defendant knowingly had possession or control of the beer found, provided you should find it to be beer, by the officers in pursuance of the search-warrant issued by the Commissioner. There has been evidence submitted on this point, showing the relative situation of the places where the alleged beer was found by the officers as to the main building of the Dory and the Northern

and the rooms therein; also what was said and done at the time of the search and other facts and circumstances. This was admitted in evidence as throwing light on the question of the conscious possession and control of the beer alleged by the Government to have been found, and from that and the other evidence in the case, it devolves upon you, the jury, to determine whether or not the defendant is guilty or not guilty of the crime charged; that is, having possession of intoxicating liquor.

As I have heretofore stated to you, in this as in all criminal cases, you must be satisfied, beyond a reasonable [168—157] doubt, before you can find the defendant guilty of the crime charged. A reasonable doubt is one based on reason and which is reasonable in view of all the evidence in the case. If after an impartial comparison and consideration of all the evidence, or from want of evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of defendant's guilt, you have a reasonable doubt. But if, after an impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of defendant's guilt, such as you would be willing to act upon in all the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Some testimony has been introduced on the part of the prosecution relating to certain statements or admissions made by the defendant, at or during the time of the search by the Government's officers

under the search-warrant. I charge you that oral admissions or statements of a defendant are to be received with caution and viewed with scrutiny and that in considering such testimony, you should take into consideration the surrounding circumstances and surroundings of the defendant, and the probability or improbability of his having made such statements, not because witnesses wilfully misstate alleged admissions or statements they may have heard, but because it is a well-known fact that it is easy to be mistaken as to the words or expression used by a third person which we undertake to repeat a long time afterward.

Some comment has been made by the counsel for the defendant as to whether the affidavit for the search-warrant in this case was sworn to before the search-warrant was issued. That is not direct testimony in this case. It is a matter [169—158] for the Judge of the court to determine whether the search-warrant was properly issued. Every officer is presumed to do his duty according to law, and the burden is not on the Government at any time to prove that the officer did his duty. The burden or presumption being that he did do his duty, the burden is on the other side to show that he did not so do it.

You, Gentlemen, are the sole judges of the weight of the evidence and the credibility of the witnesses in the case. Yet your power of judging of the weight of evidence submitted is not arbitrary, but is to be exercised with legal discretion, in subordination to the rules of evidence. You are not bound to find

in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds. A witness wilfully false in one part of his testimony may be distrusted in other parts.

In judging of the weight to be given to testimony of the witnesses in the case and their credibility, you may take into consideration the character of the witness, his demeanor on the stand, his interest, if any, in the result of the trial, his relation thereto, the intelligence or want thereof of the witness, the opportunity or lack of opportunity for knowing the facts concerning which he may testify, the probability or improbability of his story, his apparent candor and fairness, or want thereof, and when witnesses directly contradict each other, you should consider all the evidence in the case and after such consideration, determine which witnesses are most worthy of credit and give credit accordingly.

In this connection, I deem it my duty to call your attention to the fact that in the consideration of this case, as in all other cases coming before the court for trial, it is your duty as jurors as well as my duty as judge, not to permit [170—159] our private opinions or prejudices to sway us from our duty to try the case and render our judgment upon all the evidence before us and the law. Neither you nor I have anything to do with the expediency or policy of the Alaska Bone Dry law or any other law enacted by the proper authority. Your opinion and my private opinion may be

against the expediency or policy of the law; yet when that law is enacted by constituted authority, it is our duty to abide by and obey it, and when placed in the position of Judge and jury, charged with the enforcement thereof, to enforce it. By this, it is not meant that we should go beyond our duty in its enforcement, but if the evidence has convinced you, as the jury, beyond a reasonable doubt, that the defendant has violated the law, it is your duty to find him guilty, regardless of what your private opinion may be as to the expediency or policy of the law. Should you, however, by reason of the evidence or lack of evidence, have a reasonable doubt as to whether the defendant has violated the law in the manner and at the time set forth in the accusation, you should find him not guilty. You should consider the question of the guilt or innocence of the defendant solely upon the evidence and make your decision upon that only. You should not let bias, prejudice, sympathy or friendship divert your minds from the evidence or sway your judgment in the consideration thereof, but calmly and dispassionately consider the whole evidence with the law as given you by the Court and render your verdict upon that only.

I hand you two forms of verdict—one finding the defendant guilty as charged; the other finding him not guilty. When you retire to your jury-room, you will elect one of your number foreman, and after careful and impartial consideration of all the testimony, having agreed upon a verdict, you will sign a corresponding verdict, through your

foreman, and return the same into open court.
[171—160]

In the District Court of the United States for the
Territory of Alaska, Division Number One.

No. 757—KB.

THE UNITED STATES OF AMERICA

vs.

JERRY SIMPSON.

Verdict

Special May Term, 1922.

We, the Jury, empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment.

Dated at Ketchikan, Alaska, this 24th day of May, 1922.

D. W. SANFORD,

Foreman.

Filed in the District Court, District of Alaska, First Division. May 25, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. 5, page 44.

We, the jurors, duly impaneled and sworn to try the case of United States (Plaintiff), vs. Jerry Simpson (Defendant), respectfully [172—161] request the leniency of the Court in the above-entitled action.

D. W. SANFORD,

Foreman.

(Also signed by each juror.)

In the District Court for the Territory of Alaska,
Division No. One, at Ketchikan.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY SIMPSON,
Defendant.

Judgment and Sentence.

This matter coming on to be heard for imposition of sentence upon the above-named defendant, Jerry Simpson, upon a verdict of guilty of the crime of possessing intoxicating liquors in violation of Section 1 of the Alaska Bone Dry Law, being an act of Congress to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska, approved February 14, 1917, such verdict having been heretofore, to wit, on the 24th day of May, 1922, rendered and filed by a jury duly impaneled and sworn to try this cause on appeal from the United States Commissioner's Court for the Precinct of Ketchikan, Territory of Alaska, Division Number One, at Ketchikan, Alaska, wherein on the 17th day of January, 1922, said defendant was by a jury fully selected and empaneled, found guilty of the crime of possessing intoxicating liquor in violation of Section 1 of said Alaska Bone Dry Law. The defendant is present in court and represented by A. H. Ziegler and James Wickersham, his attorneys; Arthur G. Shoup, United States Attorney, being present on behalf of the Government. The Court,

asking said defendant if he has any good and sufficient reason why sentence should not now be imposed, to which he offers no good or sufficient reason; and the Court being fully advised in the premises, [173—162] does say:

That it is the judgment of the Court that said defendant, Jerry Simpson, is guilty of the crime of possessing intoxicating liquors in violation of section 1 of said Alaska Bone Dry Law, and it is the sentence of the Court that the defendant Jerry Simpson pay a fine of \$700 and be confined in the federal jail at Juneau, Alaska, for four months, and that he be imprisoned in addition to such jail sentence, until such fine is paid, not exceeding three hundred and fifty days.

Done in open court this fifth day of June, 1922.

THOMAS M. REED.

Judge.

Filed in the District Court, District of Alaska, First Division. June 5, 1922. J. H. Dunn, Clerk.

Entered Court Journal No. 5, page 63.

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 757—KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY SIMPSON,

Defendant.

Motion for New Trial.

Comes now Jerry Simpson, the above-named defendant and moves this Court to set aside the verdict of the jury in the above-entitled cause, which verdict was rendered by said jury and filed in the cause on May 25, 1922, upon which verdict the defendant was found guilty of violation of an act commonly known as the Alaska Bone Dry Law, prohibiting the possession of intoxicating [174—163] liquors in the Territory of Alaska, and to grant to the defendant a new trial upon the following grounds and for the following reasons, to wit:

1. Irregularity in the proceedings of the Court, jury and adverse party, and abuse of discretion by the Court, by which said party was prevented from having a fair trial, and in particular by the refusal of the Court to dismiss the said cause and instruct the jury to return a verdict for the defendant upon the close of the case, as presented by the prosecution, upon the ground that there was not any testimony offered before the jury at that time that the defendant was guilty of having intoxicating liquor in his possession or under his control at the time mentioned in the complaint and in the evidence and relation thereto.

2. Misconduct of the prevailing party in that the United States District Attorney, when questioning J. B. Simpson, an important witness for the defendant, asked said witness if he had not been convicted of a felony, which question was asked by said United States Attorney with a view of prejudicing the jury

against the said witness, and was asked by said prosecuting attorney who knew at said time that said question was improper and not authorized by the laws of Alaska, governing the impeachment of a witness.

3. Insufficiency of the evidence to justify the verdict in this case.

4. Error in law occurring at the trial and in connection with the preliminary matters relating to the trial, excepted to by the defendant in this:

(a) That the Court erred in overruling the demurrer to the complaint filed by the defendant.

(b) That the Court erred in overruling the motion of the [175—164] defendant to suppress the evidence in this case, on the ground that the same was obtained under a search-warrant, which said search-warrant and the affidavit upon which it is based were and are void and illegal, and not in accordance with the Fourth Amendment of the Constitution of the United States, and in violation of the defendant's rights thereunder; and because said affidavit and search-warrant do not state facts sufficient to create a probable cause or to authorize the issuance of the search-warrant, and the search conducted thereunder was in violation of law and an unreasonable and unlawful search.

(c) That there was no evidence presented in the case that any search-warrant was legally issued by any competent court or person whatsoever, because said search-warrant and the affidavit upon which same was based were not introduced in evidence in the trial of said cause.

(d) That the Court erred in instructing the jury that the search-warrant and affidavit upon which it was based were presumed to be legal, and that the officers who issued the same are presumed to have done their duty with reference thereto, and that the burden is on the defendant to prove that said affidavit and said search-warrant were irregular and void, to all of which errors above mentioned the above defendant duly excepted.

(e) And for the further errors committed by the Court in the ruling on objections and motions, as appears by the Court stenographer's transcript, and to which reference is made for a more accurate description.

WHEREFORE, defendant prays that the Court set aside the verdict heretofore rendered in this cause, and grant the defendant a new trial.

Dated at Ketchikan, Alaska, this 26th day of May, 1922. [176—165]

JAMES WICKERSHAM and
A. H. ZIEGLER,

Attorneys for Defendant.

Copy rec'd and service admitted this 26th day of May, 1922.

ALFRED E. MALTBY,
Asst. U. S. Attorney.

Filed in the District Court, District of Alaska,
First Division. May 26, 1922. ————, Clerk.
By ————, Deputy

—which motion was, on Monday, June 5, 1922, overruled and exception allowed.

(Same Caption and Title.)

Petition for Writ of Error.

To the Honorable THOS. M. REED, Judge of the
Above-entitled Court;

The above-named defendant, Jerry Simpson, feeling himself aggrieved by the verdict of the jury rendered herein on May 24, 1922, and the judgment and sentence thereon rendered in this Court on June 5, 1922, whereby the defendant, Jerry Simpson was adjudged guilty of the crime of possessing intoxicating liquors in violation of Section 1 of the Alaska Bone Dry Law, being an act of Congress to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska, approved February 17, 1917, and sentenced this fifth day of June, 1922, by the judge of this Court to pay a fine of \$700 and be confined in the federal jail at Juneau, Alaska, for four months, and that he be imprisoned in addition to such jail sentence until such fine is paid, not exceeding 350 days.

Comes now the defendant and petitions this Honorable [177—166] Court for a writ of error allowing said defendant, Jerry Simpson, to prosecute a writ of error in and to the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the law in such cases made and provided; also, that an order be made staying the proceedings and execution in such case until a further order of the United States Circuit Court of Appeals

and pending the prosecution of said writ of error.

JERRY SIMPSON,
WICKERSHAM & ZIEGLER,
Attorneys for Defendant.

Due service of a copy of the foregoing petition for writ of error is admitted this fifth day of June, 1922.

A. G. SHOUP,
United States District Attorney.

Filed in the District Court, District of Alaska,
First Division. June 5, 1922. J. H. Dunn, Clerk.

(Same Caption and Title.)

Order Allowing Writ of Error and Fixing Supersedeas Bond.

This cause coming on to be heard in open court on this fifth day of June, 1922, and the Court having examined the petition for writ of error herein, and having heard counsel for the United States and for the defendant, it is ordered that the writ of error be allowed in this case, and the amount of the supersedeas bond on file herein be fixed at the sum of \$2,000.

Done in open court this fifth day of June, 1922.

THOS. M. REED,
District Judge. [178—167]

Filed in the District Court, District of Alaska,
First Division. June 5, 1922. J. H. Dunn, Clerk.

Entered Court Journal, No. 5, page 65.

(Same Caption and Title.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Jerry Simpson, the above-named defendant, as principal, and Wm. Temple, and John Ramm, as sureties, all of Ketchikan, Alaska, are held and firmly bound unto the United States of America, in the penal sum of \$2,000, for which payment well and truly to be made we bind ourselves and each of us, our heirs and each of our heirs, executors, and administrators firmly by these presents.

Signed, sealed and dated at Ketchikan, Alaska, June 5, 1922.

The condition of the above obligation is such that, whereas, the above-named principal and defendant, Jerry Simpson, is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled court rendered by the District Court of the Territory of Alaska, Division Number One, and entered and made herein on June 5, 1922, whereby and by the terms of which the said defendant, Jerry Simpson, was sentenced to pay a fine of \$700 and be confined in the federal jail at Juneau, Alaska, for four months, and that he be imprisoned in addition to such jail sentence until such fine is paid, not exceeding 350 days, for the crime mentioned in the said judgment and sentence. [179—168]

NOW, THEREFORE, the condition of this obligation is such that if the said defendant, Jerry Simpson, shall prosecute said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, and shall at all times render himself amenable to the orders and processes of this court, or the United States Circuit Court of Appeals, for the Ninth Circuit, and render himself in execution if the judgment of this court is confirmed, or any judgment of this court in said proceedings, or said Appellate Court, or any court, then this obligation shall be void; otherwise to remain in full force and effect.

JERRY SIMPSON,
Principal,
W. TEMPLE,
Surety,
JOHN RAMM,
Surety,

A. H. ZIEGLER.
JOHN H. DUNN.

Taken and acknowledged before me this fifth day of June, 1922.

JOHN H. DUNN,
Clerk of District Court.

United States of America,
Territory of Alaska,
City of Ketchikan,—ss.

Wm. Temple and John Ramm, being first duly sworn, on oath, depose and say, each for himself: I am one of the sureties on the foregoing bond; I am a resident of the Territory of Alaska, but not

a counsellor or attorney at law, marshal, clerk of any court, or other officer of any court; I am over the age of twenty-one years, and I am worth the sum of \$2,000, specified in the foregoing undertaking, and over and above all my just debts and liabilities; and exclusive of property exempt from execution.

[Seal]

W. TEMPLE.

JOHN RAMM, [180—169]

Subscribed and sworn to before me this fifth day of June, 1922.

JOHN H. DUNN,

Clerk of the Court.

Filed in the District Court, District of Alaska, First Division. June 5, 1922. J. H. Dunn, Clerk.

Approved this fifth day of June, 1922.

THOS. M. REED,

District Judge.

(Same Caption and Title.)

**Order Approving Sureties on Bond and Granting
Stay of Proceedings.**

This cause coming on to be heard upon the matter of the approval of the bond on appeal of the defendant, Jerry Simpson, and the Court having examined the bond and the sureties thereon, and having heard counsel for both parties, it is ordered that the sureties on the aforementioned bond are hereby approved, and a stay of proceedings in said cause is granted, in accordance with law.

Done in open court this fifth day of June, 1922.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska,
First Division. June 5, 1922. J. H. Dunn, Clerk.

Entered Court Journal No. 5, page 65. [181—
170]

[Endorsed]: No. 3917. United States Circuit
Court of Appeals for the Ninth Circuit. Jerry
Simpson, Plaintiff in Error, vs. The United States
of America, Defendant in Error. Transcript of
Record. Upon Writ of Error to the United States
District Court of the District of Alaska, Division
No. 1.

Filed August 24, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit, at San Francisco, California.

No. 3917.

JERRY SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Statement of Errors upon Which Plaintiff in Error
Intends to Rely and Parts of Record Necessary
to Print.**

**STATEMENT OF ERRORS UPON WHICH
APPELLANT INTENDS TO RELY.**

Comes now Jerry Simpson, appellant in the above-entitled cause, and files this his statement of errors upon which he intends to rely in the trial of the above-entitled cause, and also enumerates the parts of the record which he thinks necessary for the consideration thereof:

1. The Trial Court for the Territory of Alaska, Division Number One, at Ketchikan, erred in overruling the demurrer to the complaint in the above-entitled cause, for the reasons set forth in said demurrer, to which action of the Trial Court the appellant then and there excepted, and an exception was duly allowed.

2. The Trial Court for the Territory of Alaska, Division Number One, at Ketchikan, erred in refusing to grant the petition of appellant to suppress the evidence obtained under the search-warrant in the above-entitled cause, for the reason that the affidavit upon which said search-warrant was based did not show or pretend to state facts showing any probable cause to believe that this appellant had committed any crime or had in his possession any evidence of any crime so committed by himself or anyone else, and because, therefore, said search-warrant was in violation of appellant's rights under.

the Fourth Amendment to the Constitution of the United States, and was without foundation in law.

PARTS OF THE RECORD WHICH APPELLANT CONSIDERS NECESSARY FOR CONSIDERATION OF THE ERRORS ABOVE ENUMERATED.

1. Complaint for the violation of Section Alaska Bone Dry Act, Public 308, which appears on page 2 of the transcript of the above-entitled cause now on file in this court.

2. Search-warrant, which appears on pages 3 and 4 of the transcript of the above-entitled cause now on file in this court.

3. Affidavit for search-warrant, which appears on pages 4 and 5 of the transcript of the above-entitled cause now on file in this court.

4. Demurrer, which appears on pages 6, 7 and 8 of the transcript of the above-entitled cause now on file in this court.

5. Order overruling demurrer, which appears on page 8 of the transcript of the above-entitled cause now on file in this court.

6. Proceedings of the Court on Monday, May 22, 1922, commencing on page 9 and ending on page 10 of the transcript of the above-entitled cause now on file in this court.

7. Motion of appellant, Jerry Simpson, commencing on page 10 and ending on page 11 of the transcript of the above-entitled cause now on file in this court.

8. Proceedings of the Court, commencing on

page 12 and ending on page 13 of the transcript of the above-entitled cause now on file in this court.

9. Verdict, commencing on page 161 and ending on page 162 of the transcript of the above-entitled cause now on file in this court. .

10. All matter commencing with the judgment and sentence on page 162 and ending on page 170 of the transcript of the above-entitled cause now on file in this court.

Dated at Ketchikan, Alaska, this 6th day of December, 1922.

JOHN J. SULLIVAN and
A. H. ZIEGLER,

Attorneys for Appellant.

Copy of the foregoing received and service admitted this 6th day of December, 1922.

A. G. SHOUP,
United States District Attorney for the District of
Alaska, Division Number One.

[Endorsed]: No. 3917. United States Circuit Court of Appeals for the Ninth Circuit. Statement of Errors upon Which Plaintiff in Error Intends to Rely and Parts of Record Necessary to Print. Filed Dec. 12, 1922. F. D. Monekton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit, at San Francisco, California.

No. 3917.

JERRY SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Designation of Additional Parts of Record Which
Appellee Thinks are Material.**

Comes now A. G. Shoup, United States Attorney
for the First Division of the District of Alaska
(within ten days after appellant filed his statement
of errors on which he intends to rely), and design-
ates additional parts of the record which he thinks
are material, as follows:

1. All the testimony of Fred E. Handy, begin-
ning on page 14 of the transcript and ending on
page 51, and beginning on page 102 and ending on
page 107.

2. All the testimony of T. W. McDonald, begin-
ning on page 54 of the transcript and ending on
page 69.

3. All the testimony of Lonnie McIntosh, begin-
ning on page 70 of the transcript and ending on
page 89.

4. All the testimony of Harold A. Snyder, be-
ginning on page 89 of the transcript and ending on
page 92.

5. All the instructions to the jury, beginning on page 154 and ending on page 160.

Dated at Ketchikan, Alaska, December 11, 1922.

A. G. SHOUP,

United States Attorney.

Copy of the foregoing received Dec. 11th, 1922.

A. H. ZIEGLER,

Attorney for Appellant.

[Endorsed]: No. 3917. United States Circuit Court of Appeals for the Ninth Circuit. Jerry Simpson, Plaintiff in Error, vs. United States of America, Defendant in Error. Designation of Defendant in Error Under Subdivision 8 of Rule 23. Filed Dec. 22, 1922. F. D. Monekton, Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

7

JERRY SIMPSON,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

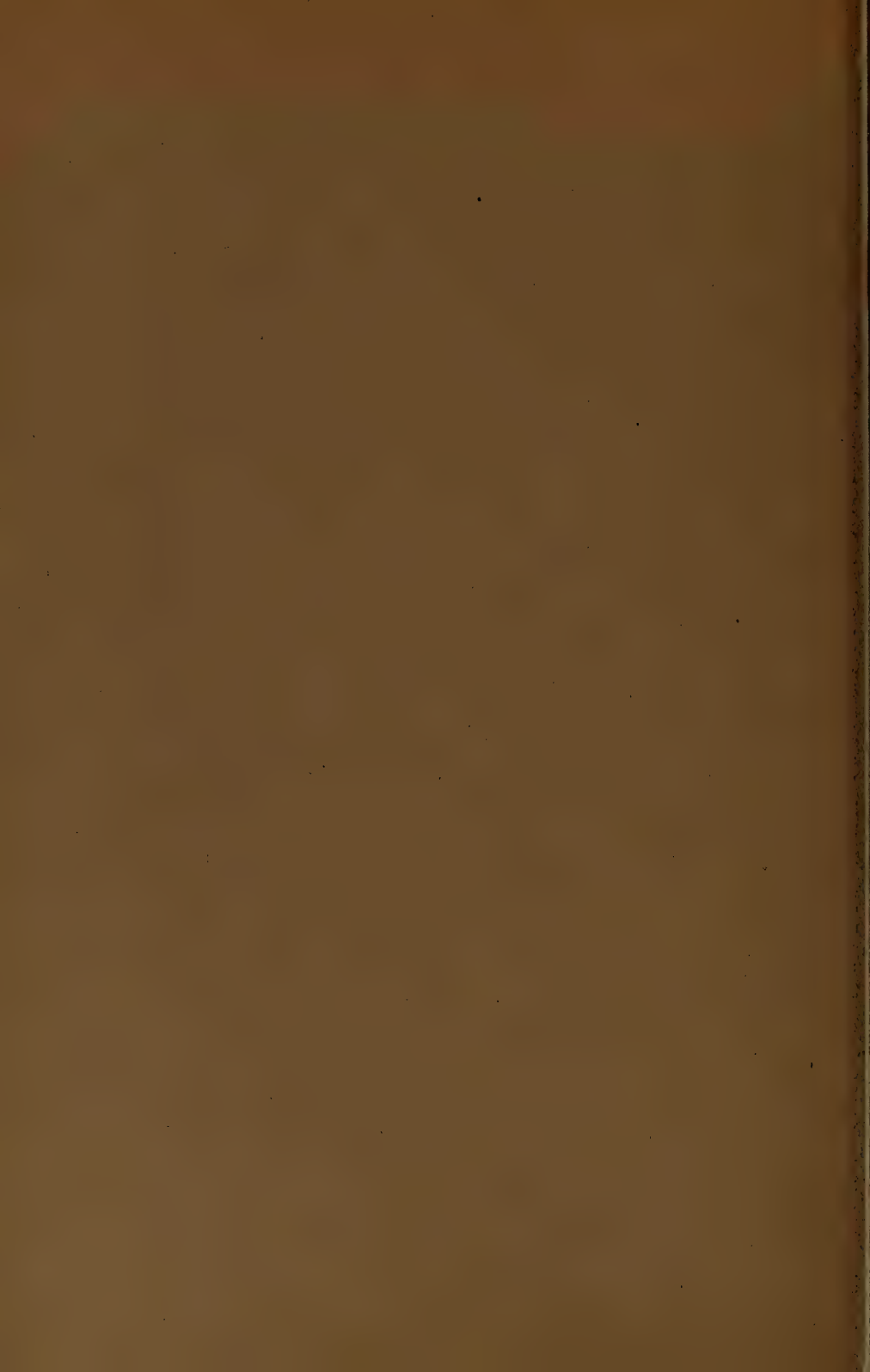
*Appeal from the District Court for the District
of Alaska, Division Number One,
at Ketchikan.*

OPENING BRIEF ON BEHALF
OF APPELLANT

JOHN J. SULLIVAN,
Seattle, Washington.

A. H. ZEIGLER,
Ketchikan, Alaska.

Attorneys for Appellant.



United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JERRY SIMPSON,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

*Appeal from the District Court for the District
of Alaska, Division Number One,
at Ketchikan.*

**OPENING BRIEF ON BEHALF
OF APPELLANT**

JOHN J. SULLIVAN,
Seattle, Washington.

A. H. ZEIGLER,
Ketchikan, Alaska.

Attorneys for Appellant.

STATEMENT OF THE CASE

Appellant in error, Jerry Simpson, was found guilty in the United States Commissioner's Court at Ketchikan, Alaska, upon a complaint filed in said court as follows:

In the United States Commissioner's Court
at Ketchikan, Alaska.

United States of America,

vs.

Jim Simpson and Jerry Simpson.

Complaint for the violation of Section
Alaska Bone Dry Act, Public 308.

Jim Simpson and Jerry Simpson is accused by Fred Handy in this complaint of the crime of having intoxicating liquor in their possession, committed as follows: The said Jim Simpson and Jerry Simpson, at Ketchikan, Alaska, in the District of Alaska, and within the jurisdiction of this court, did on the 7th day of January, 1922, wilfully and unlawfully have concealed and in their possession and under their control intoxicating liquor, the same being in violation of the Alaska Bone Dry Act, Public No. 308, contrary

to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

(Signed) FRED E. HANDY.

United States of America,
District of Alaska, ss.

I, Fred Handy, being first duly sworn, depose and say that the foregoing complaint is true.

FRED E. HANDY.

Subscribed and sworn to before me this ninth day of January, 1922.

A. W. Fox,
United States Commissioner, and
ex-officio Justice of the Peace.

Tran. 1, 2.

From the judgment of said Commissioner's Court, the defendant, Jerry Simpson, appellant in error, appealed to the District Court for the Territory of Alaska, Division Number One, at Ketchikan, and upon a trial *de novo* in that court, was found guilty and sentenced to pay a fine of \$700.00, and be confined in the federal jail at Juneau, Alaska, for four months.

Tran. 115, 116.

From the judgment and sentence of the District Court the defendant, Jerry Simpson, brings error to this court.

ASSIGNMENTS OF ERROR

The court erred in overruling the demurrer to the complaint in the above entitled cause, for the reasons set forth in said demurrer.

Tran. 126.

The court erred in refusing to grant the petition of appellant to suppress the evidence obtained under the search warrant in the above entitled cause, for the reason that the affidavit upon which said search warrant was based did not show or pretend to state facts showing any probable cause to believe that this appellant had committed any crime or had in his possession any evidence of any crime so committed by himself or anyone else, and because, therefore, said search warrant was in violation of appellant's rights under the Fourth Amendment to the Constitution of the United States, and without foundation in law.

Tran. 126, 127.

ARGUMENT

DEMURRER TO THE COMPLAINT

The complaint upon which this prosecution is based was drawn under the provisions of the "Alaska Bone Dry Act."

It is our contention that the "Alaska Bone Dry

Act" was repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.

In the case of *Abbate v. United States*, 270 Fed. 735, this court decided that the Alaska Act was not repealed by the National Prohibition Act.

The effect of the provisions of the Eighteenth Amendment upon the Alaska Act was not presented in that case, or passed upon by the court.

As to the effect of the National Prohibition Act in repealing the Alaska Bone Dry Act, we urge every objection made in the *Abbate case*, and adopt as our argument the dissenting opinion of Judge Ross.

But we rely mainly upon the provisions of the Eighteenth Amendment. The effect of these provisions upon the Alaska Bone Dry Act has never been presented or passed upon by this court, as far as we have been able to ascertain.

EIGHTEENTH AMENDMENT

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this *article* by appropriate legislation.

We especially call the court's attention to the fact that Section 1, which declares the purpose and object of the amendment, expressly extends its operation to

“The United States and all territory subject to the jurisdiction thereof”

while Section 2, in express terms confers the power of enforcing the Article, upon

“The Congress and the several states.”

The well known maxim,

Epressio unius est exclusio alterius

applies here. Having conferred this power upon Congress and the several states, and omitting any reference to the territories, Section 2 is to be construed exactly as if the territories had been *in express terms* excluded from the exercise of the power to enforce “by appropriate legislation”, the provisions of Section 1.

Broom in his “Legal Maxims” says that no maxim of law is of more general and uniform application; and it is never more applicable than in the construction and ap-

plication of statutes. Whenever statutes limit a thing to be done in a particular form, it necessarily includes in itself a negative, viz: that the thing shall not be done otherwise.

19 Cyc. 23.

Story in his work on the Constitution, at Sec. 448, says:

“There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the Constitution declares that the powers of Congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions of a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority is intended.”

And in Section 1905, the same writer says:

“The next amendment is: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”. This clause was manifestly introduced to present any perverse or ingenious misapplication of the well known maxim that an affirmation in particular cases implies a negation in all

others, and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe."

In *Hepburn v. Ellzey*, 2 L. Ed. 442,

Chief Justice Marshall, referring to the several uses of the word "state" in the Constitution, and construing the meaning of that term, as used in the instrument, says:

"These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term of signification attached to it by writers in the law of nations."

In *Seaton v. Hanham*, R. M.. Charlt. (Ga.) 374, the court says:

"After a most careful examination of this subject * * I have come to the conviction that the term "State", when used in the Constitution of the United States, is confined to a member of the American Confederacy; that it does not embrace a Territory of the United States; * * "

Miners Bank v. Iowa, 13 L. Ed. 867.

Scott v. Jones, 12 L. Ed. 181.

New Orleans v. Winter, 4 L. Ed. 44.

Darst v. Peoria, 13 Fed. 561.

U. S. v. Ames, 95 Fed. 453.

It is obvious that the Eighteenth Amendment confers upon Congress and the several states concurrent power to enforce its provisions within the several states, but that outside of the states, and within the jurisdiction of the United States, the power of enforcement is conferred exclusively upon Congress.

If this contention is correct, the Bone Dry Law of Alaska is invalid, and appellant's demurrer should have been sustained.

Our second assignment of error is based upon the action of the trial court in overruling the defendant's motion, made before any testimony was introduced, to suppress all testimony obtained by the government under an illegal and void search warrant.

Trans. 11, 12, 13.

The third paragraph of the motion is:

"Because all evidence in this case was obtained by officers of the United States, after they had gained possession and control of this defendant's premises, while acting under a search warrant which did not in any manner describe or authorize a search of any premises belonging to or under the management or control of this defendant,

and while said officers remained in possession and control of this defendant's place of business, against his protest, after abandoning the search thereof, until such time as a new search warrant could be obtained, authorizing a search of property alleged to be under control of this defendant."

All the witnesses, except one, who testified as an expert to the nature of the liquor found on defendant's premises, were officers of the law, to wit: Fred E. Handy, a Deputy United States Marshal, (Trans. 15); T. W. McDonald, City Patrolman, Ketchikan, (Trans. 58); Lonnie McIntosh, Chief of Police, Ketchikan, (Trans. 75).

All of these officers participated in the search of defendant's premises.

The testimony of the witness Handy, Deputy United States Marshal, and in relation to the conduct of the search of defendant's premises, the testimony of all the witnesses was substantially the same, is that the officers entered and searched the defendant's premises by virtue of a pretended search warrant. Tran. 24. That this search lasted about an hour, or an hour and a half. Tran. 24. That on the advice of the District Attorney, he desisted from further search under this search warrant. (Tran. 24, 25). That thereupon a second search warrant was obtained

and the search resumed. (Tran. 27). This witness testified that during the interval—ten or fifteen minutes—between desisting from the search on the first warrant, and resuming the search on the second warrant the officers were away from the premises, but admitted on cross-examination, that in his testimony before the Commissioner he had stated that:

“I asked Mr. Maltby for another search warrant, and he said he would get it, and he did. We stayed there—the police force and myself, and then later, when I searched the storeroom, etc.” Tran. 26.

The Mr. Maltby referred to, was the District Attorney.

It is not very material, under the circumstances of this search, whether the officers remained on the premises or not.

The first search warrant is not in the record, but that it was deficient in failing to describe the premises searched seems to have been conceded throughout the trial. Tran. 12, 14, 17, 24, 28. At least, that was the opinion of the District Attorney, for upon no other ground can his advice to desist from continuing the search under it, be explained. The fact that the officers had entered and searched defendant's premises without legal warrant, is not cured by reason of the issuance of the second warrant and a

resumption of the search under it, even assuming that *that* was a legal one. The vice of the whole transaction lies in the fact that their testimony upon the trial, a material part of it, at least, was obtained by these witnesses while engaged in an unwarranted search of the defendant's premises.

The case of *U. S. v. Boasberg*, 283 Fed. 305, is exactly in point.

The information upon which they obtained the second warrant and resumed the search, was obtained by the officers by an unlawful and illegal entry upon defendant's premises.

Their entire testimony should have been suppressed.

We make the further contention that the affidavit upon which the second search warrant was obtained, does not state facts showing probable cause.

Upon this point the affidavit is as follows:

" * * deponent says * * * * he watched the premises * * * * and saw intoxicated men enter and leave said premises; that said deponent saw intoxicated men in said * * * * premises and saw men deport themselves as under the influence of intoxication."

The vice of this allegation is that he

“saw intoxicated men enter”

the premises. This fact destroys the inference which might fairly be drawn from the statement that he saw men in the premises who deported themselves as under the influence of intoxication, and that he saw intoxicated men leave the premises. There is no statement that the intoxicated men whom he saw enter the premises were not the same men whom he saw leaving the premises, or the same men whom he saw on the premises who deported themselves as under the influence of intoxication, and there is no statement from which the inference can be drawn from seeing intoxicated men entering the premises, and seeing intoxicated men on the premises, that they obtained their means for becoming intoxicated upon the premises.

The most that can be said of this allegation is that the intoxicated persons mentioned *might* have become intoxicated while on the premises, and therefore established probable cause for believing that the means of intoxication was procured upon the premises. But the opposite inference, that the intoxicated men who were seen to enter procured the means of intoxication at some other place, and that they were the men referred to who left the premises in an intoxicated condition and the men who were in an intoxicated condition while on the premises is just as strong.

It is a rule in criminal pleading, and in this

particular we know of no reason why it should not prevail in the construction of an affidavit for a search warrant, that, where an essential allegation is capable of two constructions, only one of which imports guilt, the pleading is fatally defective.

People v. Williams, 35 Cal. 671.

Upon the general proposition as to a sufficient showing of probable cause to support the issuance of a search warrant, we cite:

Giles v. U. S., 284 Fed. 208, and cases cited.

Woods v. U. S., 279 Fed. 706.

U. S. v. Boasberg, 283 Fed. 305.

Respectfully submitted,

JOHN J. SULLIVAN,
A. H. ZEIGLER,

Attorneys for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT
February Term, 1923

3917

JERRY SIMPSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

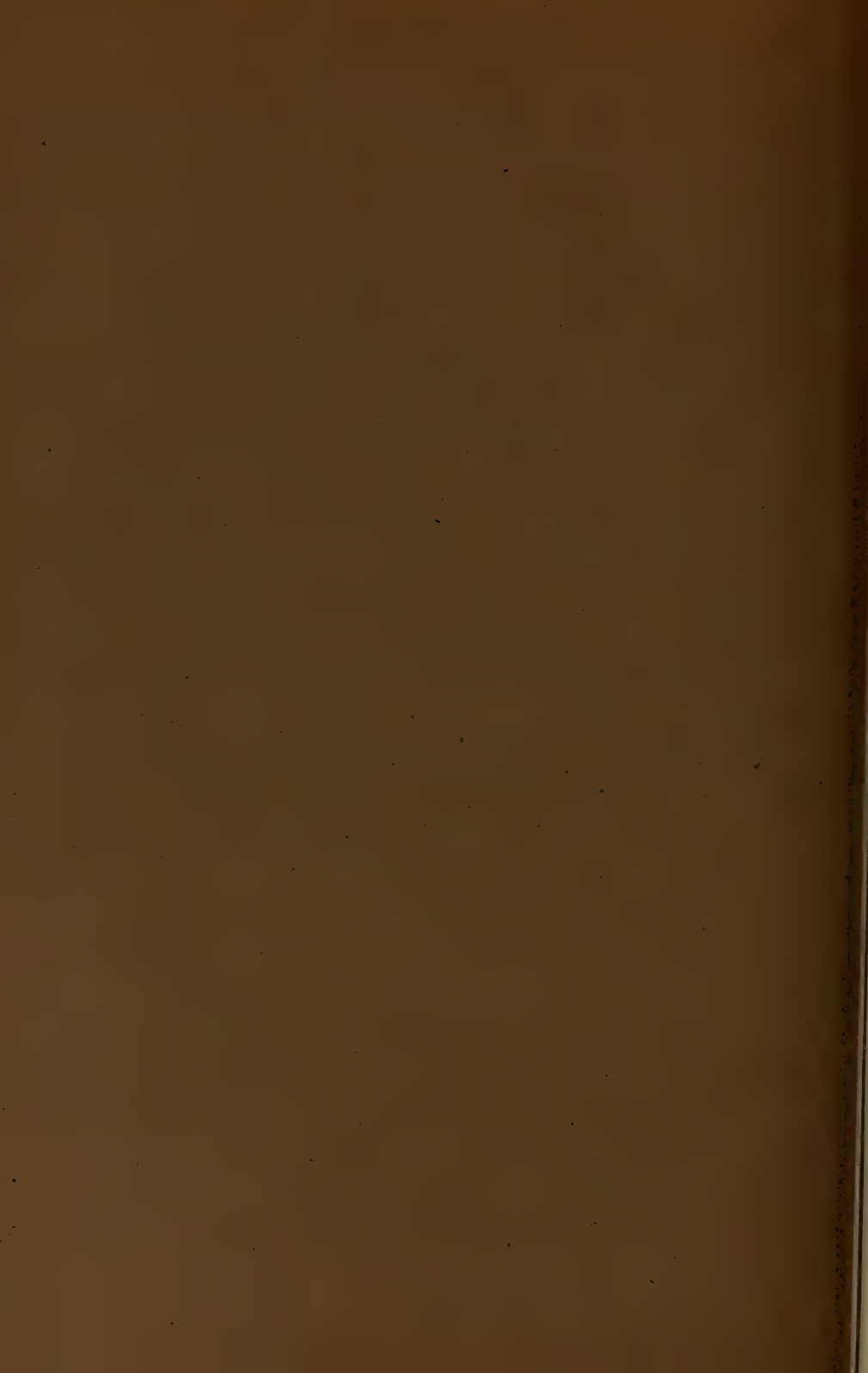
Defendant in Error.

*Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1.*

BRIEF OF APPELLEE

A. G. SHOUP,
United States Attorney.

H. D. STABLER,
Special Assistant
United States Attorney,
on Brief.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT
February Term, 1923

3917

JERRY SIMPSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

*Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1.*

BRIEF OF APPELLEE

A. G. SHOUP,
United States Attorney.

H. D. STABLER,
Special Assistant
United States Attorney,
on Brief.

ARGUMENT

1. THE ALASKA BONE DRY ACT WAS NOT REPEALED BY THE NATIONAL PROHIBITION ACT.

The statement by counsel for Plaintiff in Error, hereinafter designated as appellant that (p 5 Brief) "The effect of the provisions of the Eighteenth Amendment upon the Alaska Act was not presented in that (Abbate) case, or passed upon by the court" is not correct, for in the case of *Abbate v. U. S.* 270 *Fed.* at page 737 this court says:

"In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, AFFECTS no more the Alaskan act than it does the state acts."

This Court affirmed the decision in the Abbate case in the case of *Koppitz v. U. S.* 272 *Fed.* 96. Hunt, C. J. speaking for the court says at page 99:

"The contention of defendant that the complaint on its face is invalid, because it charged

that the offense was committed on May 31, 1920, and that the Alaska Bone Dry Law was impliedly repealed by the Eighteenth Amendment and the National Prohibition Act (41 U. S. Stat. (1919) p. 305) is not well founded, for this court ruled to the contrary in *Abbate v United States*, 270 Fed. 735."

It follows that the District Court properly overruled the demurrer to the complaint upon the authority of the foregoing cases.

2. THE SEARCH OF APPELLANT'S PREMISES WAS LAWFUL AND THE EVIDENCE OBTAINED WAS LAWFUL, BECAUSE:

(a) The officers were acting under a valid search warrant.

(b) No search warrant was necessary—the search and seizure of intoxicating liquors was based upon a crime committed in the presence of the officers.

(a) THE OFFICERS WERE ACTING UNDER A VALID SEARCH WARRANT.

Appellant alleges that the affidavit upon which the search warrant in this case is based does not state facts sufficient to show probable cause, and therefore the search was illegal and in violation of appellant's constitutional rights. The affidavit, so far as pertains to the allegations of

fact showing or tending to show probable cause, is in the following language (pp 4, 5, 6 transcript):

“And this deponent further says that on the fifth day of January, 1922, he watched the premises hereinafter described and occupied by Jim Simpson and Jerry Simpson, and saw intoxicated men enter and leave said premises; that said deponent saw intoxicated men in said hereinafter described premises and saw men deport themselves as under the influence of intoxication.”

Then follows a description of the premises to be searched as a two story frame building at Ketchikan, Alaska,

“known as and designated as the Northern Hotel and Bar, and in the lower story or floor thereof and particularly that portion thereof known and designated as the Dory.”

Counsel contend that because affiant “saw intoxicated men enter” the premises, there is no inference that intoxicating liquor was possessed, sold, kept, given away, or otherwise furnished, on the premises. But the premises to be searched are described in said affidavit as the “Northern Hotel and Bar and that portion thereof known and designated as the Dory,” and the inference therefrom may fairly be drawn that said North-

ern Hotel and Bar and 'Dory' is a public place where intoxicated persons resort and congregate together for the purpose of drinking intoxicating liquors. Further, the deponent stated that he saw intoxicated men in said premises and saw men deport themselves therein as under the influence of intoxication, and the inference can be fairly drawn that these men were others than those he saw entering the premises. The inference arrived at by the magistrate from the facts stated was properly drawn. The facts stated were positive, and sufficient to justify a finding of probable cause.

The case of *Woods v. U. S.* 279 Fed. 706, cited by appellant, has no application or bearing upon the case at bar. In the Woods case the search warrant, and affidavit upon which it was obtained, were held defective because based upon information and belief, and did not particularly describe the persons or things to be seized. There were no facts stated. And further the search warrant proceedings were based upon a different statute and in different proceedings from the case at bar.

The case of *U. S. v. Boasberg*, 283 Fed. 305, cited by appellant, is not in point for the reasons hereinafter pointed out.

The case of *Giles v. U. S.* 284 Fed. 208, cited by appellant, is not in point. In the Giles case the

affidavit did not state any facts upon which the magistrate could base a finding of probable cause. The warrant was held bad for other reasons. A casual reading of the Giles case will disclose the vice in appellant's reasoning.

Appellant contends that the information upon which the so-called second search warrant in this case was obtained was discovered while the officers were executing a first search warrant upon adjoining premises, and that the case of *U. S. v. Boasburg*, 283 *Fed.* 305, is exactly in point and controlling.

The record shows that appellant's conclusion in this respect is erroneous. The evidence shows (pp. 16, 17 and 18 transcript) that the so-called first and second search warrants were executed on the same day, to wit, January 7, 1922. The so-called second search warrant bears date of January 7, 1922, as does the affidavit upon which said search warrant is based. The affidavit for the second search warrant, the one in question, (p. 4 transcript) shows that the facts, upon which are based probable cause, occurred January 5th, 1922, two days prior to the search on either the first or second warrant. It appears, therefore, that the facts stated in obtaining the second search warrant were NOT discovered upon the execution of the first search warrant. It could not be a fact, therefore, that all, or any, of the evidence was obtained by officers of the United

States "AFTER THEY HAD GAINED POSSESSION AND CONTROL OF THIS DEFENDANT'S PREMISES WHILE ACTING UNDER THE SO-CALLED FIRST SEARCH WARRANT," as alleged by appellant in his petition for suppression of evidence, and as alleged in his brief (p. 9 Brief).

But even if the officers had learned the facts upon which the second search warrant was based while searching adjoining premises it would not render the search warrant in this case unlawful or void. The search as disclosed by the evidence in this case was not in violation of appellant's constitutional rights.

The evidence shows that the Northern Hotel and Bar, called the "Dory" was a public place, (p. 50 Transcript) to wit, a so-called soft drink parlor. In this place appellant conducted a licensed business (p. 16 Transcript). He had a lunch counter (pp. 31 and 93 Transcript) and a bar (p. 25 Transcript) for dispensing soft drinks. The place also contained billiard and card tables for the use of patrons who chose to visit the appellant's place of business. The officers had been there before the seventh day of January, and being open to the public they had a right to visit such place. They were not trespassers there in any sense of the word; and it is not material whether they remained on, or departed from, the premises during the time it took them

to get a second search warrant to continue their search, or whether they secured the information upon which the search warrant was based while so on the premises.

The case of *U. S. v. Boasberg*, 283 Fed. 305 which appellant says is exactly in point, does not apply to the facts of this case at all. In the Boasberg case officers searched a PRIVATE DWELLING OCCUPIED AS SUCH under a search warrant based upon facts discovered while searching adjoining premises. The officers were trespassers when they entered this private dwelling, and they had no legal right to remain therein until they could obtain a second search warrant to continue their search into such private dwelling; and they had no legal right to use evidence obtained after such unlawful entry. There is no similarity whatever between the Boasberg case and the case at bar in point with appellant's reasoning. But even though the search warrant in the case at bar was invalid for the reasons stated in appellant's brief, the search and seizure was lawful, because:

(b) NO SEARCH WARRANT WAS NECESSARY TO SEARCH THESE PREMISES. The crime of possessing intoxicating liquor was committed by this appellant in the presence of the officers. Section 2399 Compiled Laws of Alaska provides: "A peace officer may, without a warrant, arrest a person, for a crime committed or

attempted in his presence.” Deputy United States Marshal Fred E. Handy testified (bottom of p. 53 Transcript) as follows:

Q. “What was your purpose in going back?”

A. “My purpose was to wait for the tide to go out and get some beer that had been dropped from a trap or trip that I tripped myself. I unlocked it, in unlocking the door, I pulled the trip and let it fall down on the flats or in the bay, and the tide was in and I wanted to wait until the tide got out. When the tide went out, I wanted to get whatever it was on the beach.”

It appears by the evidence that this officer, who was directing the search under the warrant, entered a public place. In other words the officer was lawfully upon the premises. It appears by this evidence that he was made conscious of the fact that the appellant unlawfully had intoxicating liquor, to wit, beer, in his possession in such place because the officer says in effect that when he entered this place he opened a trip or trap, a familiar device to prohibition enforcement officers, and that some beer dropped therefrom into the water under the building. This beer must have been in plain sight of the officer while he was lawfully upon the premises. The Alaska Bone Dry Act, section 1, defines beer as intoxicating liquor. Under said Act the appellant could not lawfully have beer in his pos-

session for any purpose. The crime of unlawfully possessing intoxicating liquor was committed in the presence of the officer and he had a legal right to arrest the appellant and to seize the liquor and search these premises without a warrant. In the case of *Dillon v. U. S.* 279 *Fed.* 646 (CCA 2) the court says: "It may be conceded that a government agent has no right to enter a private house to search for liquors without a search warrant. But in this case they did nothing of the kind. They entered a public bar of a hotel, where people were free to come and free to go. The officers had the same right to enter that the public had."

In the case of *O'Connor v. U. S.* (D. C.) 281 *Fed.* 396, at page 399 District Judge Rellstab says:

"Having lawfully entered, and being made conscious, through sight and smell, of the possession of the liquors, and noting conditions evidencing that the liquors were kept in violation of the National Prohibition Act, they had the legal right to seize them without first securing a search warrant." (Citing) *U. S. v. Borkowski* (D. C.) 268 *Fed.* 408; *Kathriner v. U. S.* (C. C. A. 9) 276 *Fed.* 808; *U. S. v. Bateman* (D. C.) 278 *Fed.* 231; *U. S. v. Snyder*, (D. C.) 278 *Fed.* 650; in re *Mobile* (D. C.) 278 *Fed.* 949."

In the case of *Vachina v. U. S.* 283 *Fed.* 35,

Circuit Judge Gilbert speaking for this court says:

“The prohibition enforcement agents testified that the place of business of the plaintiff in error consisted of a soft drink bar-room, adjoining which was a large dining room, in the rear of which was a kitchen. That on December 29, 1920, they entered the kitchen, and while one of them handed to the plaintiff in error a search warrant, the other discovered and took possession of a bottle and a demijohn, which were in plain sight on the floor beneath a table. There was proof that the bottle contained brandy and the demijohn contained wine, the alcoholic strength of which was more than 1 per cent, and that they were fit for beverage. We do not deem it necessary to enter into a discussion of the question whether or not the affidavit was sufficient to justify the issuance of a search warrant. While the officers on entering the premises which were the defendant's place of business had a search warrant, the intoxicating liquor which was seized was in plain sight, was unlawfully in the possession of the plaintiff in error, and his possession thereof constituted an offense in violation of the National Prohibition Act. Although one of the officers handed a search warrant to the plaintiff in

error while the other simultaneously took possession of the liquor, the search warrant was unnecessary. The plaintiff in error was engaged in the actual commission of an offense denounced by the law, in that he had possession of intoxicating liquor in his place of business."

Circuit Judge Ross, speaking for this court in the case of *Kathriner v. U. S.* 276 Fed. 809, in a situation at a public soft drink bar similar to that in this case said:

"Under the circumstances of the case, as disclosed by the evidence, a search warrant was not necessary."

See also *Driskill v. U. S.* 281 Fed. 146 (CCA 9).

In the case of the *United States v. Camarota et al.* 278 Fed. 388, (D. C.) Trippet, District Judge says:

"The officer, having entered upon the premises without having committed a trespass, and thus being lawfully there, and seeing a crime being committed, had a perfect right, and it was his plain duty, to seize the articles which were being used in committing the crime. In making such seizure, the officer could not do so by virtue of the search warrant, but in the performance of his general duty to prevent the commission of

crime. *United States v. Fenton* (D. C.) 268 *Fed.* 221, *Ex parte Morrill* (CC) 35 *Fed.* 261; 20 *Stat. at Large*, 341 section 1 (*Comp. St. section* (1676); *U. S. v. Welsh* (D. C.) 247 *Fed.* 239.”

In the case of *Elrod v. Moss*, 278 *Fed.* 123 (CCA 4) Woods, C. J. lays down the rule that:

“Under the federal as well as the state statutes, to justify a search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused. BUT IT IS NOT NECESSARY THAT HE SHOULD ACTUALLY SEE THE CONTRABAND LIQUOR. Here the plaintiff had resisted the warrant to search his car for contraband liquor; he had struck the officer from his car to prevent the search, and in flight had thrown a package from his car. We think the jury might well conclude that all this constituted a discovery by Gosnell of the plaintiff in the act of transporting contraband liquor in his automobile, and that Gosnell was justified in making the arrest for interference by plaintiff with the performance of his official duty.”

In the case of *Lambert v. U. S.* 282 *Fed.* 413 (CCA 9) this court lays down the rule that:

“The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense.”

The search of this appellant's place of business, with or without warrant, under the circumstances as disclosed by the evidence in this case, would have been lawful under the National Prohibition Act. It was lawful under the Alaska Bone Dry Act also.

According to the authority of the foregoing decisions, the search and seizure in this case was lawful and must be upheld.

CONCLUSION

Counsel for United States of America respectfully maintain:

1. That the District Court properly overruled the demurrer to the complaint—the Alaska Bone Dry Act was not repealed by the National Prohibition Act.

2. That the District Court properly refused to suppress evidence obtained on the search warrant in this case because: (a) the search warrant was valid and lawful; (b) or, if not, the crime being committed in the presence of the officer in a public place, no search warrant was necessary.

Therefore, the conviction must be sustained.

Respectfully submitted,

ARTHUR G. SHOUP,

U. S. Attorney.

HOWARD D. STABLER,

Special Assistant U. S. Attorney.

